No. 89-1814

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In the Supreme Court

OF THE

United States

ROSSCO HOLDINGS INCORPORATED,
a California Corporation
d.b.a. QUAKER CORPORATION,
MICHEL T. GHOSN,
Petitioners,

VS.

STATE OF CALIFORNIA,
CALIFORNIA COASTAL COMMISSION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEALS SECOND APPELLATE DISTRICT, DIVISION THREE

JOSEPH M. GUGHEMETTI*
GUGHEMETTI & SPANGENBERG
Attorneys at Law
800 Airport Boulevard
Suite 410
Burlingame, CA 94010
Telephone (415) 343-9300
Attorneys for Petitioners

**Counsel of Record*

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED FOR REVIEW

1. Inverse Condemnation Remedy:

Are Quaker's constitutional claims for just compensation arising out of extortive development conditions imposed by the California Coastal Commission (including a mandatory payment of $297,500 to an environmental organization as a condition of residential development of property) barred for failure to file a state statutory writ of mandate action which does not allow an award of just compensation?

2. Constitutional "Due Process" Standard for Evidence:

Can Quaker's constitutional just compensation claims be limited to the "evidence" contained in the California Coastal Commission's administrative record process which denies fundamental due process guarantees (right of cross-examination, testimony under oath, right of subpoena, judicial officer)?

3. Waiver of Constitutional Rights:

Can Quaker be compelled by the California Coastal Commission to waive its constitutional rights for relief under the U.S. Constitution as a condition to residential development of its property?

4. Coastal Zone Boundary Jurisdiction:

Did the California Legislature establish a specific statewide topographical standard for coastal zone jurisdiction (Public Resources Code § 30103) which has been violated by the California Coastal Commission through the improper assertion of jurisdiction over the appellants' property without due process of law?

PARTIES TO THE PROCEEDING

The only parties to this proceeding are those listed in this caption, and additionally the County of Los Angeles, and Las Virgenes Homeowners Federation Inc. (who both appeared at the trial court level but did not make an appearance on appeal).

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PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEALS SECOND APPELLATE DISTRICT, DIVISION THREE

PETITION FOR WRIT OF CERTIORARI

Petitioners (Rossco Holdings Inc. d.b.a. *Quaker* Corporation and Ghosn), respectfully pray that a Writ of Certiorari issue to review a judgment of the California Court of Appeal, Second Appellate District, Division Three.

JURISDICTION

The decision of the Court of Appeal (App. A), was issued on July 26 1989, and is reported at (1989) 212 C.A.3d 642. The order of the California Supreme court denying review (App. B), was issued on November 2, 1989, and was not published. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1257(a).

In 1987, this Court issued two landmark land use decisions: *First English Evangelical Lutheran Church of Glendale v. County*

of Los Angeles (1987) 482 U.S. 304 and *Nollan v. California Coastal Commission* (1987) 483 U.S. 825.

In *First English*, this Court overruled the prior California rule (*Agins v. City of Tiburon* (1979) 24 C.3d 266) which had limited judicial relief for a fifth amendment regulatory taking to "invalidation" (writ of mandamus) rather than "just compensation". In the process, this Court affirmed the right to seek just compensation in an inverse condemnation action.

In *Nollan*, this Court decried as unconstitutional "extortive" conditions imposed by the Coastal Commission upon a landowner. That owner (Nollan) was allowed to build in defiance of the Coastal Commission's extortive demand while simultaneously successfully challenging the unconstitutionality of uncompensated public access dedication requirements.

These two decisions, which both centered on abuses of private property rights in California, became *the* celebrated landmark land use cases of their time.[1]

In 1987, following these decisions, the petitioners filed this action.[2] Petitioner Quaker challenged Coastal Commission conditions imposed by a coastal permit finally issued in *1985*, requiring Quaker as a condition to development to (1) pay an environmental group the sum of $297,500.00 for participation in a transfer of

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[1]Within a short period of time, *First English* and *Nollan* received extensive citation in legal journals and case review. Bauman, "The Supreme Court becomes serious about takings law": The First Church, Keystone and Irving Cases (1987) 10 Zoning and Planning L.Rep. 145, 146; Falik & Shimko "The Taking Nexus: The Supreme Court Chooses a New Direction in Land Use Planning: A View from California" (1988) 39 Host L. Journal 359; Best "The Supreme Court Becomes Serious About Takings Law: Nollan Sets New Rules for Exactions" (1987) 10 Zone Plan, L.Rep. 153.

[2]Petitioner Quaker and Ghosn, separate landowners, jointly challenged the legality of the Coastal Commission's asserted jurisdiction over their properties: a boundary line jurisdiction issue. Petitioner Quaker alone proceeded in this action for damage claims attributable to improper asserted conditions on development of its "Piuma" property, located in Los Angeles County.

development credit program and (2) dedicate to the government a substantial portion of its property without compensation.

Although Quaker accepted the approval of the development, it timely challenged the improper conditions by filing an "inverse condemnation action" under the due process and defacto taking clauses (5th and 14th Amendments, U.S. Constitution, Article I, Section 19, California Constitution). At the time this lawsuit was filed, Quaker was still making installment payments on the $297,500.00 exaction, while the required "offer to dedicate" its landholding was still pending but had not yet accepted by a government entity (J.A. 6, Complaint 64(a) and (b)). Thus, at the time this action was filed, *both* extortive exactions were pending. Following a trial court ruling on the pleading, the parties proceeded on appeal. The Court of Appeal's *ruled that Quaker could not proceed on either just compensation claims (First English) or challenges to extortive conditions (Nollan) because it had not filed a preliminary state writ of mandate action and had waived its right to challenge the Coastal Commission's conduct: the very issues resolved by First English and Nollan.*

The California court system has effectively emasculated this Court's landmark decisions — it refuses to enforce them.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional principles are relevant to the petition:

1. The Fifth Amendment to the United States Constitution:

"... Nor shall private property be taken without just compensation."

2. The Fourteenth Amendment, Sec. 1 to the United States Constitution:

"Sec. 1 ... nor shall any state deprive any person of life, liberty or property without due process of law."

STATEMENT OF CASE

Appellant, ROSSCO HOLDINGS INCORPORATED (d.b.a. *QUAKER CORPORATION*) is the owner of two separate tracts of land consisting of 272 acres ("Mulholland Property") and 102 acres ("Piuma Property") both located in the same area of the County of Los Angeles (J.A. 6, Complaint ¶ 1 and 62). Appellant Ghosn is the owner of 160 acres located in the County of Los Angeles (J.A. 6, Complaint ¶ 2).

In 1985 the California Coastal Commission issued a coastal development permit which approved residential development of Quaker's Piuma Property *on the condition* that Quaker *pay an environmental group* (Mountains Restoration Trust) *the sum of $297,500.00* for participation in a transfer of development credit program, (J.A. 6, Complaint ¶ 64(a)) *and* that Quaker *offer to dedicate to a government entity a substantial portion of its property without compensation* (J.A. 6, Complaint ¶ 64(b)).

In addition, both the Quaker properties (Mulholland and Piuma) and Ghosn's property are located in a rural area *beyond* the Coastal Zone jurisdiction established by the California legislature. The Coastal Act of 1976 limits the Coastal Commission's jurisdiction to *the first major ridge line parallel to the sea or five miles from the mean high-tide line, whichever is less* (Public Resources Code § 30103). The Coastal Commission was delegated the responsibility to prepare specific maps of the coastal zone to reflect the legislative intent on jurisdiction, *but instead on its own and without any further legislative review or public hearings, evidence or scrutiny of any kind, drafted maps which extended its jurisdiction 2-3 miles beyond the first major ridge line of Los Angeles County thus improperly exercising jurisdiction over the appellants properties* in violation of the appellants' rights of due process.

The appellants' complaint primarily sought the following relief:

1. An award of just compensation for damages attributable to the excessive and extortive conditions of development imposed upon Quaker's Piuma Property by the California Coastal Commission (Fifth and Fourteenth Amendments,

U.S. Constitution; Article 1, Section 19, California Constitution).

2. An award of just compensation for the interim de factor taking of both Quaker's Mulholland property and Ghosn's property by virtue of improper assertion of jurisdiction by the California Coastal Commission over land holdings beyond the legislatively approved and directed coastal zone boundary (Fifth and Fourteenth Amendments, U.S. Constitution and Article 1, Section 19, California Constitution).

3. Declaratory Relief invalidating the coastal boundary jurisdiction of the Coastal Commission as applied to the appellants' property.

The published appellate decision follows a Superior Court ruling on demurrer, in which as a matter of law, the Court had to assume that the facts as alleged and as properly judicially noticed were true.

The Superior Court sustained a demurrer on all grounds with a resulting Order of Dismissal (J.A. 3, 4, and 5). The Superior Court judgment was then appealed to the Second Appellate District which ruled for the Respondents State of California and California Coastal Commission on all issues holding that:

(a) Quaker could not recover just compensation for de facto taking or due process violations under the United States and California Constitutions since it had not filed a Writ of Mandate (invalidation) action under California Code of Civil Procedure § 1094.5;

(b) That since Quaker had accepted development approval on its property, it had *waived* its rights to challenge the constitutionality of the Coastal Commission's extortive conditions (including payment of $297,500.00 to an environmental group); and

(c) That as a matter of law, if there is any dispute over Coastal Commission jurisdiction between the topographical standard established by the State Legislature and the coastal

maps drafted by the Coastal Commission's own staff, the coastal maps controlled.

REASONS FOR GRANTING THE WRIT

A. Introduction

The California Court system has refused to enforce *First English* and *Nollan*, emasculating the clear principles expressed in those cases, and reinstating procedural state statutory remedies of invalidation (which neither afford monetary award or a constitutional hearing) as a necessary prerequisite to constitutional relief.

This case concerns more than a land use constitutional case: *it tests the sovereignty of America's judicial system.*

B. The First English Rule

In *First English*, the U.S. Supreme Court finally addressed an issue which had remained in substantial controversy since *Agins v. City of Tiburon*, (1979) 24 C.3d 266. In *Agins* the California Supreme Court previously ruled that a landowner could not bring an inverse condemnation action for damages under the California or U.S. Constitution arising out of a regulatory taking, but rather was restricted to an administrative mandamus remedy: an action for invalidation. During the following decade, the U.S. Supreme Court was asked to review this doctrine based on constitutional claims that the mandamus remedy was an inadequate remedy which could not be imposed as a restriction to a constitutional claim for damages.

In *First English* the U.S. Supreme Court held in unequivocal terms that a regulatory taking of property necessitates the obligation to pay just compensation. Accordingly, the U.S. Supreme Court reversed *Agins* holding that mandamus could not be required as a remedy for the constitutional guarantee of just compensation.

> "... We now turn to the question of whether the just compensation clause requires the government to pay for temporary regulatory takings ... Consideration of the com-

pensation question must begin with direct reference to the language of the Fifth Amendment which provides in relevant part that private property shall not be taken for public use without just compensation . . . government action that works a taking of property rights necessarily implicates the constitutional obligation to pay just compensation (*Armstrong v. U. S.* 364 U.S. 40, 49 (1960)." *First English supra* at 2386.

"We have recognized that a landowner is entitled to bring an action of inverse condemnation *as a result of the self-executing character of the constitutional provision with respect to compensation* . . ." (Emphasis added) *First English supra* at 2386.

"Where this burden results from government action that amounted to a taking, the just compensation clause of the Fifth Amendment requires the government pay the landowner for the value of the use of the land during this period. See cf. *U.S. v. Causby* 328 U.S. at 261 (it is the owner's loss not the taker's gain which is the measure of the value of the property taken). *Invalidation of the ordinance* or its successor ordinance after this period of time though converting the taking into a temporary one *is not sufficient remedy to meet the demands of the just compensation clause.*" *First English supra* at 2388 (emphasis added).

Accordingly, *First English* was allowed to proceed with damage claims *despite the fact that it had not filed any mandamus action* (either Code of Civil Procedure § 1094.5 following an administrative hearing, or Code of Civil Procedure § 1085 seeking to mandate or prohibit a wrongful government act where an administrative hearing has not occurred.)

This *First English* rule was consistent with pre-*Agins* law that a constitutional claim could not be precluded by state statute because the Constitution was self-executing. As stated in *Rose v. State of California* (1942) 19 C.2d 713, 721, 723, 725:

"In fact this court has already held section 14 of article I to be self-executing . . .

> "It will be noted however that in neither of said cases did the court in any way imply that by state legislation or a lack thereof a constitutional right may be taken away or denied altogether, for it is likewise elementary that the legislature by statutory enactment may not abrogate or deny a right granted by the Constitution."

Moreover, soon thereafter, other states recognized the *immediate right* to a constitutional claim for damages. In *Florida,* the Court of Appeal acknowledged this *First English* doctrine:

> "Thus, the court in *First Lutheran Church* recognized that when a taking occurs, independent of any statutory authorization a landowner has a right to file an action in inverse condemnation." *Joint Venture v. Department of Transportation* (1988) 519 So.2d 1069.

In *Missouri,* the doctrine was acknowledged:

> "Under the Fifth and Fourteenth Amendments a landowner has a right to challenge land use regulations by way of suit for inverse condemnation." *Harris v. Missouri Department of Conservation* (1988) 755 S.W.2d 726.

In *Oregon,* its Court of Appeals concluded that Oregon law was consistent with *First English,* that is "a landowner has a choice either to bring an inverse condemnation action *in the first instance* or to seek monetary relief . . . " *Dunn v. City of Redmond* (1987) 739 P.2d 55, 56 N. 1.

Only California, marching to its own drumbeat, would disavow this court's doctrine emanating from California's own prior error *(Agins, supra)* and hence defy the Supreme Court.

The *First English* rule is consistent with the significant substantive differences which existed between state mandamus proceedings for invalidation and a constitutional claim for damages. A writ of mandate's only available relief is *invalidation* of a government act; it does not allow an award of compensation.

> "Code of Civil Procedure § 1094.5 confers no power on this court to convert an action for administrative mandamus review into a plenary action for damages . . . Even if we were

> to remand this case the trial court would likewise lack power to convert an action for administrative mandamus review into a plenary action for damages." *Markley v. City Council* (1982) 131 C.A.3d 656.

Moreover, a government act may be valid and yet still require an award of just compensation. Thus, even an ordinance which advances a legitimate government interest cannot repeal operation of the constitutional guarantee of just compensation. *Loretto v. Teleprompter,* 458 U.S. 425; *Kaiser Aetna v. United States* 444 U.S. 164; *U. S. v. Security Industrial Bank* (1982) 459 U.S. 70. In *Hurley v. Kincaid* (1931) 285 U.S. 95, the United States Supreme Court acknowledged that an owner can concede the validity of a government project and yet still obtain an award of just compensation.

Administrative Mandamus relief seeks to overturn the finality of a regulatory permit, resulting in a second "follow-up" hearing, as opposed to a de facto taking or due process claim which does not set aside the hearing or trigger a new hearing, but rather awards just compensation for the consequences of the de facto taking and constitutional violation.

Moreover, the California Coastal Act itself recognizes that the right to judicial review pursuant to C.C.P. § 1094.5 (mandamus) "shall be *in addition to any other remedies available at law*". Public Resources Code § 30800.

Despite these clear alternate remedies, the California courts have now effectively reinstated the *Agins* rule. In *Quaker* the Court of Appeals relied on another recent California appellate decision *California Coastal Commission v. Superior Court (Ham)* (1989) 210 C.A.3d 1488, requiring a mandate action within 60 days of the challenged act *or a landowner was banned from a constitutional claim for just compensation:*

> "In a recently published opinion, the only other court to address this issue concluded a petition for administrative mandate under Code of Civil Procedure § 1094.5 remains a necessary predicate to institution of inverse condemnation proceedings. (*California Coastal Commission v. Superior Court (Ham) (1989) 210 C.A.3d 1488. We agree with the*

Ham holding that *State of California v. Superior Court (Veta)* (1974) 12 C.3d 237 must be read as establishing as early as 1974 that an administrative mandate action was a necessary *procedural predicate* to seeking inverse condemnation damages based upon a regulatory taking accomplished by an administrative agency." Ex. A Opinion, p. 21 (Emphasis added).

The California court's decision represents a demand that invalidation, again, become the primary remedy:

> ". . . whether Quaker pleads its cause of action as one for inverse condemnation or as a denial of due process, *the essential underpinning of its recovery is the invalidity of the administrative action.* That action must be reviewed by petition for writ of administrative mandate. Failure to do so renders the administrative action immune from collateral attack." Ex. A, Opinion, p. 28. (Emphasis added).

In addition, the California courts have sent a message to Judge Scalia's finding in *Nollan.* In *Nollan,* the Supreme Court found that the California Coastal Commission was guilty of "extortion" practices (access dedications without payment of compensation as condition to building of a home). The California courts consider the Coastal Commission's real problem not its conduct, but apparently its failure to anticipate Judge Scalia's legal reprimand:

> "Here, the Commission quite clearly had subject matter jurisdiction and the authority to impose permit condition reasonably related to any burdens on the public beach created by construction of Ham's residence . . . The fact that it incorrectly analyzed the relationship between the burdens and the condition it sought to impose — *or perhaps more accurately, incorrectly anticipated the action of the U. S. Supreme Court* — it acted in excess of its jurisdiction in the fundamental sense." *California Coastal Commission v. Superior Court (Ham)* (1989) 210 C.A.3d 1488.

The California courts have rendered the *First English* rule meaningless as they simultaneously discount the constitutional principles of *Nollan.*

C. A constitutional claim for just compensation may not be restricted to the evidence controlled by internal Coastal Commission procedures and administrative processes that violate fundamental due process:

One of the fundamental flaws of the court's ruling (necessity for mandamus-invalidation action) is that remedy necessarily restricts the evidence of constitutional violations to the Agency's own "administrative record", for the reviewing court has no authority to exercise independent judgment of the facts or conduct a trial de novo. *Alboncio v. Madera Irrigation District* (1960) 53 C.2d 735.

Quaker has raised fundamental questions of lack of due process — challenging arbitrary procedures by the Coastal Commission in substance and procedure. In its Request for Judicial Notice, Quaker established that the statewide hearing procedures of the Coastal Commission (regardless of applicant or permit) do not afford the most minimum notion of due process (*lack of cross-examination, lack of subpoena, testimony not under oath, lack of judicial officer to rule on evidentiary questions, unreasonable hearing time limitations*). The Court of Appeals routinely dismissed these flaws (see Opinion pp. 22-23) contending they were raised at a hearing involving Quaker's other property and "the [other] Quaker parcel is no longer in issue here". Yet that misses the point of the judicial request. The Commission's procedural flaws addressed in the Request for Judicial Notice *reflected the statewide practices and restrictions of the Coastal Commission as acknowledged by its chief legal officer, Chairman and decision of the Commission — the uniform statewide policies of the California Coastal Commission regardless of applicant or landholding.*

Those flaws further demonstrate the error of the Court of Appeals ruling which effectively limits a constitutional just compensation claim to a state administrative mandamus proceedings, predicated solely on an administrative record. How can a constitutional claim for just compensation, often taking weeks of trial, be restricted to evidence contained in a 10-15 minute administrative proceeding with these due process flaws? It cannot. *In order for an administrative hearing to have a collateral effect on a*

constitutional claim, that hearing process must be judicial in character.

In *United States v. Utah Construction* (1966) 384 U.S. 394, 16 L.Ed.2d 642, 86 S.Ct. 1545, the Supreme Court stated that collateral estoppel may be applied to administrative agencies "when an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an aequate opportunity to litigate . . . "

In *People v. Sims* (1982) 32 C.3d 468, the California courts acknowledged and incorporated these specific federal standards necessary in order to recognize the "judicial character" of an administrative proceeding. Those standards of federal due process are conspicuously absent the Commission's administrative review:

1. *Testimony Under Oath:* The administrative record of the Coastal Commission authorizes review of anything submitted, by mail, testimony or hearsay report, without *oath.*

2. *The Right to Cross-Examine:* The Coastal Commission process does not allow this.

3. *Power to Subpoena Witnesses:* Neither the Commission, applicants or participants are allowed to subpoena witnesses.

4. *The Hearing is Conducted in an Impartial Manner:* The applicant is limited to a 10-15 minute presentation within which to respond to voluminous staff and third-party responses, almost always negative.

5. *Judicial Officer:* The Coastal Commission hearings are not presided over by a judicial officer capable of, or authorized to, consider matters of evidence.

The California administrative mandamus process is restricted to this administrative record process of the Coastal Commission. Accordingly, this California decision requires that a landowner, seeking just compensation under the federal constitution, be limited to an administrative record (without any normal constitutional rights of evidence) in which the court is not free to weigh evidence.

It is from this record that the California courts now mandate that a constitutional claim be tried.

D. A landowner cannot be forced to waive constitutional claims:

The Court of Appeal's opinion concluded that Quaker had accepted development approval and hence could not challenge the conditions imposed by the Commission (on development of the Piuma Property) holding that conduct constitutes a waiver of any right to challenge the constitutional violation of the conditions. The Court of Appeal based its decision on *Pfeiffer v. City of La Mesa* (1977) 69 C.A.3d 74, 78 and in the process attempted to distinguish *Nollan v. California Coastal Commn.* (1987) 483 U.S. 825 as not involving a waiver rule. It is important to note that *Pfeiffer* itself was based on the same erroneous type of *Agins* doctrine: that mandamus (invalidation) was the only appropriate remedy.

The Court of Apopeal held that if a landowner accepts a development approval, the landowner may not thereafter challenge the unconstitutionality of the conditions, for that decision constitutes a waiver. *In effect, the landowner either waives his constitutional rights to challenge the Coastal Commission's conduct or he is prevented from using his property.*

The Court of Appeal's decision is constitutionally flawed; a party may not be required to waive a constitutional challenge. Previously in *Salton Bay Marina Inc. v. Imperial Irrigation Dist.* (1985) 172 C.A.3d 914, California courts explained the public policy against such a waiver, holding as follows:

> " . . . *all contracts affecting the public interest which have for their object, directly or indirectly, to exempt anyone from responsibility for his own negligence or injury to the person or property of another are against public policy and void. . . .*
>
> * * *
>
> Since the District *has a duty to avoid wasting water and to prevent flooding, then it follows an agreement seeking to exempt the District from liability for doing exactly that which the policy of the law forbids is contrary to public*

policy and void." Salton Bay, supra at 938-940 (emphasis added).

Waiver is not applicable to the present case because of the exception recognized in *Salton Bay* as confirmed in *Nollan* (the condition was contrary to public policy). The Commission's actions in exacting excessive conditions has been recognized by the United States Supreme Court as "an out-and-out plan of exortion" (*Nollan,* 97 L.Ed.2d at 689) and a "leveraging of the police power". *Id.* at 690 n. 5. Such government conduct which is clearly against public policy and violative of constitutional rights cannot be subject to waiver.

This same issue was resolved by an Illinois appeallate court as it rejected a waiver argument. After reviewing permit conditions in light of *Nollan,* the court stated:

> "*The department nonetheless contends that Amoco's agreement to the conditions by accepting the permit should bar them from raising its validity in this action. We are constrained to disagree* . . . Moreover, we are reluctant to consider Amoco's acceptance of the permit to constitute a waiver of its constitutional right to just compensation. . . If we were to hold that a property owner could waive his right to just compensation as a means of obtaining an access permit, the Department might use that condition to allow access where it otherwise would not under the guidelines of the statute. Thus, notwithstanding the inequities of Amoco's conduct, *the fact that it accepted the permit is of no consequence.*" *Department of Transportation v. Amoco Oil Company* 528 N.E.2d 1018, 1024-25 (Ill. App. 2d Dist. 1988) (emphasis added).

In this case the California Coastal Commission had a statutory prohibition against engaging in the taking of property: confirmed in its own legislative enabling act:

> "The legislature hereby finds and declares that this division is not intended and shall not be construed as authorizing the . . . commission . . . to exercise their power to grant or deny a permit in a manner which will take or damage private

> property for public use without the payment of just compensation therefor." Public Resources Code § 30010.

In *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, the Supreme Court chastised the Coastal Commission in its practice of exacting public easements from landowners, as a condition of building their home, as unconstitutional "extortion".

Here, it would be against public policy to allow an agency that controls all land development rights (and thus can perpetuate a continuing non-economic use of raw land) to claim that an owner waives the right to challenge unconstitutional conduct by agreeing to accept the development permit.

The Court of Appeals attempted to distinguish *Nollan:* a case in which the Nollans both built their house *and* challenged the legality of the condition (easement dedication) to that permit. The Court of Appeals stated:

> "The Nollans, on the other hand, never accepted the public easement condition. To the contrary, they timely fought the condition all the way to the highest court in the land. Although they did build the home which was the subject of the permit proceedings, they did so without notifying the Commission and while their battle with the Commission continued." App. A, Opinion, p. 19.

Thus, the Court of Appeals attempts to distinguish Nollan from Quaker on the grounds Nollan timely filed its action challenging the condition. So did Quaker here — but the remedy was different. At the time Nollan filed, *First English* had not yet occurred so as to reverse *Agins v. City Tiburon.* Accordingly, the only relief the Nollans had when they filed their action was a writ of mandate — their *only available challenge* to the conditions. By contrast, when this action was filed after *First English,* inverse condemnation was again available, and Quaker timely filed this action for inverse condemnation. Thus, *Nollan* supports Quaker's position — if a landowner files a timely lawsuit for the then appropriate available remedy (inverse for *Quaker;* mandate for *Nollan*), you may both accept the permit (as Nollan did) and challenge the consitutional violation of the permit condition.

E. The Coastal Commission's statewide jurisdiction is limited by a legislative topographical restraint which may not be expanded by coastal maps drafted by the Coastal Commission.

Appellants' (Quaker and Ghosn) properties are each located far inland of the ocean, almost 2-3 miles *inland* of a first major ridgeline. The Coastal Act (Public Resources Code § 30103(a)) provides that coastal zone jurisdiction *is limited* and restricted to "the first major ridgeline paralleling the sea, or five miles from the mean high tide line of the sea, *whichever is less. . .*" as shown on maps. The Coastal Commission's own staff was directed to draft maps within 60 days after its first meeting reflecting this legislative mandate (Public Resources Code § 30103(b)); instead, they drafted coastal maps significantly beyond (inland) of this restriction and improperly exercised jurisdiction over the appellant's property.

The appellants contend that the legislative history of the California Coastal Act demonstrates a limitation, predicated on a topographical standard, beyond which the Coastal Commission may not exercise jurisdiction (beyond the first major ridgeline).

In November 1972, the California electorate passed Proposition 20 which adopted a strict topographical standard for coastal boundary jurisdiction:

> "Coastal zone means that land in the water area of the State of California . . . extending inland to the highest elevation of the nearest coastal mountain range, *except that in Los Angeles,* Orange, and San Diego Counties, *the inland boundary of the coastal zone shall be the highest elevation of the nearest coastal mountain range or five miles from the mean high tide, whichever is the shorter distance."* Proposition 20, (Public Resources Code § 27,000 et seq.) (Emphasis added.)

Since the original Coastal Act created a temporary agency (designed to expire in 1976), the legislature considered a number of bills designed to continue the Coastal Commission as a permanent agency.

Initially, Senate Bill No. 1579 addressed the prospective jurisdictional boundary for the future coastal zone:

> *"In Los Angeles,* Orange and San Diego Counties, the inland boundary of *the coastal zone shall be the highest elevation of the nearest coastal mountian range or five miles from the mean high tide line, whichever is the shorter distance."* Joint Appendix #16; Plaintiffs' Judicial Notice, Ex. 4 (Emphasis added.)

Thereafter, State Senator Smith introduced Senate Bill No. 1277 which went through several amendments (January-June 1976) leading to a final adopted Coastal Act of 1976. *It is important to note that the bill first passed the Senate in January 1976 (J.A. 16, State's Judicial Notice) at a time when the coastal maps were not even in existence and hence the legislature was governed only by the topographical standard.* After several amendments, the June 18, 1976 version continued the same topographical theme:

> "The coastal resource management area shall include the following major recreational areas and shall extend inland to *the major inland ridgeline paralleling the coast, five miles* inland from the mean high tide line of the sea, *or as mapped in Part IV* of the Coastal Plan, *whichever is less . . .*" (Joint Appendix #16; Plaintiff's Judicial Notice, Ex. 5) (Emphasis added.)

On *August 2, 1976,* the final version of the coastal zone was described in the legislative analyst's fiscal report, as follows:

> " . . . In general, the coastal zone extends from the seaward limit of the state's jurisdiction inland 1000 yards from the mean high tide line. In significant coastal estuarine habitat and recreational areas, *it extends inland the lesser of the first major ridgeline or five miles."* (Joint Appendix #16; Plaintiffs' Judicial Notice, Ex. 3.)

The Senate Committee on Natural Resources and Wildlife Subcommittee on Land Use Planning summary confirmed that Proposition 20 was designed to protect properties located along

the scenic coastal highway *and the new Coastal Act of 1976 basically continued that topographical standard:*

> "Supporters of the bill expected that the compromises now embodied in the bill would help secure the Senate approval. On August 17, the Senate Natural Resources and Wildlife Committee voted 6-3 to send the Bill to the Senate with a recommendation for concurrence. At that point, the coastal zone jurisdiction was reduced to generally 1,000 yards, with inland extensions for environmental and recreational resource areas." (Joint Appendix #16; Plaintiffs' Judicial Notice, Ex. 2.)

Throughout the legislative drafting process, no reference was made directly to the coastal maps: *they did not even exist until August 11, 1976* (Joint Appendix #16; State's Judicial Notice, Exs. 1, 2). Nevertheless, the Coastal Commission argues a legislative intent that favored its own coastal maps over the topographical standards (where they are in conflict).

At no time did the legislative bill process assess jurisdictional boundaries based on coastal maps rather than topographical standards. In fact, *the legislature never saw coastal maps.* (Joint Appendix #6; Cpt, ¶ 6.)

From this historic background comes the *Coastal Commission's propostion accepted by the Court of Appeals* that as a matter of law if a jurisdictional conflict exists between the boundary arising out of application of the legislature's "first major ridgeline" test as compared to the Coastal Commission staff's implemented coastal maps, the legislature intended the coastal maps to control. This argument is unreasonable and would give credence to a ludicrous interpretation of the legislation and *an expansive, rather than limiting, interpretation of jurisdiction* when the legislative history indicates an intent *to restrict, rather than expand jurisdiction.* Moreover, it would deny appellants' fundamental due process, subjecting them to jurisdiction of an agency decided by the agency itself, without any further public hearings, or notice of any kind. At a minimum, landowners-citizens are entitled to a pre-deprivation hearing and due process before they are precluded from the use of their property through

imposition of a further level of government jurisdiction. *Herrington v. Sonoma* (9th Cir. 1988) 834 F.2d 1488; *Bateson v. Geisse* (9th Cir. 1988) 856 F.2d 1300; *Littlefield v. City of Afton* (8th Cir. 1986) 785 F.2d 596.

CONCLUSION

When California last visited the Supreme Court (*First English* and *Nollan*) and discussed its peculiar land use policies, this Court issued a definitive constitutional edict. The California court system refuses to abide by that decision on the calculated gamble that you will not grant another hearing. On that gamble, the judicial integrity of this federal system now rests. This petition should be granted, and the issue finally resolved with unmistakable direction, and a strong message to an arrogant court system.

Respectfully submitted,

GUGHEMETTI & SPANGENBERG
Attorneys at Law

By: JOSEPH M. GUGHEMETTI
Counsel of Record

Attorneys for Petitioners
Rossco Holdings Incorporated, d.b.a.
Quaker Corporation; Michel T. Ghosn

APPENDIX A

OPINION, CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION THREE, FILED JULY 26, 1989

CERTIFIED FOR PUBLICATION

2ND CIVIL NO. B035188

IN THE COURT OF APPEAL FOR THE COUNTY OF LOS ANGELES
SECOND APPELLATE DISTRICT
DIVISION THREE

ROSSCO HOLDINGS INCORPORATED,
a California Corporation,
d.b.a. QUAKER CORPORATION, a California Corporation,
MICHAEL T. GHOSN,
Plaintiffs, Appellants and Cross-Respondents,

vs.

STATE OF CALIFORNIA,
CALIFORNIA COASTAL COMMISSION, et al.,
Defendants, Respondents and Cross-Appellants.

APPEAL from a judgment of the Superior Court of Los Angeles County. Miriam Vogel, Judge. Modified, and as modified, affirmed.

(Super. Ct. No. C 662 732)

Filed: July 26, 1989 Robert N. Wilson, Clerk
Court of Appeal, Second District

Joseph M. Gughemetti and David C. Spangenberg; Sherman L. Stacey for Plaintiffs, Appellants and Cross-Respondents.

John K. Van De Kamp, Attorney General, N. Gregory Taylor, Assistant Attorney General, and Steven H. Kaufmann, Deputy Attorney General for Defendants, Respondents and Cross-Appellants.

Ronald A. Zumbrun, Edward J. Connor, Jr. and John M. Groen as amicus curiae in support of Plaintiffs, Appellants and Cross-Respondents.

Plaintiffs, appellants and cross-respondents Rossco Holdings Incorporated, doing business as Quaker Corporation, (Quaker) and Michel T. Ghosn (Ghosn) (collectively, appellants) appeal the order of dismissal entered after the trial court sustained the demurrer interposed by the defendants, respondents and cross-appellants State of California (the State) and the California Coastal Commission (the Commission) (collectively, respondents).[1,2]

SUMMARY STATEMENT

Appellants own substantial acreage in the Malibu-Santa Monica Mountains area of the County of Los Angeles (the County). Quaker holds title to the 227 acre Quaker property and the 102 acre Piuma property; Ghosn owns the 160 acre Ghosn property.

After the Commission imposed various conditions upon the development of the parcels, the appellants sued. Their complaint alleged the properties wrongfully had been included within the coastal zone of the Commission's jurisdiction and asserted the conditions were improper and excessive.

We shall conclude the trial court properly: (1) placed the properties within the coastal zone; (2) ruled the landowners must comply with Code of Civil Procedure (CCP) section 1094.5 prior to, or in conjunction with, a claim for inverse condemnation; and, (3) found the Commission is not a "person" for purposes of federal civil rights violations.

However, we shall reverse the trial court's ruling that acceptance of a permit and compliance with its conditions does not constitute a waiver of the right to attack those conditions.

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[1]The County of Los Angeles and Santa Monica Mountains Conservancy are parties to the litigation but not to this appeal.

[2]Code of Civil Procedure section 581d provides that a written order of dismissal signed by the trial court and filed in the action constitutes a judgment.

FACTUAL AND PROCEDURAL BACKGROUND

We treat as true all properly pleaded allegations of the complaint for the purpose of an appeal from an order sustaining a demurrer. (*Thompson v. County of Alameda* (1980) 27 Cal.3d 741, 746.) The trial court also appropriately considered matters which may be judicially noticed such as the background of the Coastal Act of 1976 (the Coastal Act), its legislative history and subsequent attempts to modify it. (*Blank* v. *Kirwan* (1985) 39 Cal.3d 311, 318; CCP, § 430.70.) We shall do likewise. Allegations of the complaint which are incosistent with, or contradicted by, judicially noticed facts must be rejected. (*Blatty* v. *New York Times Co.* (1986) 42 Cal.3d 1033, 1040.)

Preliminarily, appellants indicate certain causes of action dismissed by the trial court on the condition they be asserted in other lawsuits have been so asserted, and thus are no longer in issue in this appeal. The factual summary and procedural history here is limited to those matters which remain in dispute. The issues are: (1) the boundaries of the coastal zone; (2) the conditions imposed by the Commission on development of the Piuma property; and (3) federal civil rights claims pursuant to 42 United States Code section 1983 as to each of the three parcels respecting both the boundary dispute and the conditions imposed upon development.

1. *Allegations of the boundary dispute.*

Appellants claim their respective properties are not within the coastal zone established by the Coastal Act. In the area of these properties, the coastal zone is defined as "that land and water area . . . , specified on the maps identified and set forth in Section 17 of that chapter of the Statutes of the 1975-76 Regular Session enacting this division, . . . [I]t extends inland to the first major ridgeline paralleling the sea or five miles from the mean high tide line of the sea, whichever is less, . . . " (Pub. Res. Code, § 30103, subd. (a).)[3]

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[3]All further statutory references are to the Public Resources Code, unless otherwise indicated.

The maps referred to in section 30103, subdivision (a), drew the coastal zone boundary line in Malibu at the five-mile limit. Although appellants' properties are within this five-mile limit, they are beyond the first topographic elevation paralleling the sea. Appellants' claim this topographic elevation constitutes a major ridgeline within the meaning of the section 30103 and conclude their properties are not subject to the jurisdiction of the Commission.

Appellants seek damages for the wrongful imposition of jurisdiction by the Commission over their properties under theories of inverse condemnation, denial of due process and civil rights violations.

2. *Allegations of improper conditions of development.*

a. *The Quaker and Ghosn properties.*

Appellants contend the Commission imposed unreasonable conditions on development of their parcels. Regarding the Quaker property, these conditions, among other things, required Quaker to dedicate 200 acres of open space easement, reduce the number of residential lots on the property, create environmentally sensitive habitat areas and purchase transferable development credits (TDC's).

As to the Ghosn property, the complaint alleges the Commission delayed development in bad faith, arbitrarily changed and increased the severity of conditions it had approved in an earlier permit application, and improperly attempted to freeze the property as open space in order to facilitate its acquisition as a state or federal park.

Only the casuses of action which allege these restrictions violated appellants' civil rights remain in issue.

b. *The Piuma property.*

Quaker alleges the Commission restricted a County approved development of the Piuma property by requiring Quaker to purchase 21 TDC's at a cost of $297,000. Quaker also claims it lost County approval of more valuable lots and was forced to dedicate a portion of its land as open space.

However, the complaint also states Quaker has complied with the conditions imposed by the Commission as to the Piuma permit by purchasing the TDC's and recording an offer to dedicate to a government. The complaint states that by virtue of the permit issued July 23, 1985, "Quaker was allowed to develop" the Piuma property subject to the referenced conditions.

As to the Piuma property, Quaker alleges inverse condemnation, denial of due process and civil rights violations, and requests declaratory and injunctive relief.

3. *The trial court's ruling.*

a. *The boundary dispute.*

The trial court sustained the respondents' demurrer to the boundary dispute causes of action without leave to amend. It found the Legislature intended the maps to define the coastal zone boundary, and concluded the Legislature's failure to amend the maps to the boundary advocated by appellants, despite the introduction of two bills specifically designed to accomplish that result, suggested an intent "to leave the law as it stands."

The trial court also referred to an opinion of the Attorney General (63 Ops.Cal.Atty.Gen. 107 (1980)) which concluded the landward boundary of the coastal zone is depicted on the maps, and is not stated in the general verbal description of the coastal zone found in section 30103.

b. *Improper imposition of developmental conditions.*

The trial court ruled the Ghosn property causes of action had been misjoined and sustained the demurrer without leave to amend on that ground, but allowed Ghosn to assert each of these claims, except the federal civil rights action, in a new action.

The trial court sustained the demurrer without leave to amend as to the causes of action alleging arbitrary conditions upon the development of the Quaker and Piuma parcels on the ground section 30801 "contemplates review by administrative mandamus as the exclusive means to attack decisions of the Commission." However, the trial court allowed all the Quaker property causes of

action, except the federal civil rights claim, to be added to a pending administrative mandate action.

The demurrers as to the Piuma causes of action were sustained "without leave to amend and without leave to file another action because no mandate actions were or are pursued with regard to that property." The trial court also found the 60-day statute of limitations in section 30801 barred an administrative mandate action respecting the Piuma conditions of development.[4]

However, as to these same Piuma property causes of action, the trial court overruled the demurrer interposed by the respondents on the ground Quaker's acceptance of the permit on the Piuma property and compliance with its terms constituted a waiver of the right to attack the conditions.

c. *Alleged civil rights violations.*

The trial court sustained the demurrer without leave to amend as to all the civil rights violations. If found state agencies, such as the Commission, are not "persons" within the meaning of 42 United States Code section 1983.[5]

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[4]Section 30801 provides in pertinent part: "Any aggrieved person shall have a right to judicial review of any decision or action of the commission or a regional commission by filing a petition for writ of mandate in accordance with the provisions of Section 1094.5 of the Code of Civil Procedure, within 60 days after such decision or action has become final."

CCP section 1094.5 provides for inquiry into the validity of a final administrative order by petition for writ of mandate to the superior court. Subdivision (b) of that section provides: "The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."

[5]42 United States Code section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to

CONTENTIONS

Apellants contend the trial court incorrectly determined the coastal zone boundary jurisdiction issue and improperly dismissed the federal civil rights causes of action.

They also assert the constitutional right to sue in inverse condemnation cannot be conditioned upon a requirement that the landowner invalidate the administrative action which constitutes the taking before filing suit.

The State and the Commission have cross-appealed from the trial court's order overruling their demurrer interposed on the ground of waiver as to the Piuma property permit.

DISCUSSION

1. *The Boundary Dispute.*

a. *Historical perspective.*

In 1972 the electorate enacted Proposition 20 the Coastal Zone Conservation Act (the 1972 Coastal Act). (Former §§ 27000-27650.)

"The 1972 Coastal Act was an interim measure, destined by its own terms to expire at the beginning of 1977. It authorized the interim coastal commission to prepare a study summarizing the progress of planning in the coastal zone and delineating goals and recommendations for the future of California's shoreline for the guidance of the Legislature. The study, labeled the California Coastal Plan, was completed in December 1975 and submitted to the Legislature, which used it as a guide when drafting the California Coastal Act of 1976 [the Coastal Act].... (Pub. Resources Code, § 30000, et seq.) The Coastal Act created the California Coastal Commission... to succeed the California Coastal Zone Conservation Commission." (*Pacific Legal Foun-*

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be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

dation v. California Coastal Com. (1982) 33 Cal.3d 158, 162-163.)

Section 30001 of the Coastal Act sets forth the Legislative finding that the California coastal zone is a valuable natural resource of vital and enduring interest which exists as a delicately balanced ecosystem. In order to protect the coastal zone and prevent its further deterioration and destruction, the Legislature declared the need to plan carefully future development within the zone in a manner consistent with its permanent protection.

b. *The area within the coastal zone.*

The Coastal Zone Conservation Commission had planning and permit authority over a coastal zone limited in Los Angeles to "the highest elevation of the nearest coastal mountain range or five miles from the mean high tide line, whichever is the shorter distance." (Former § 27100.)

The final version of the Coastal Act (SB 1277), as last amended on August 12, 1976, defined the coastal zone as it is presently stated in section 30103, subdivision (a), i.e., "that land and water area of the State of California . . ., *specified on the maps* identified and set forth in Section 17 of that chapter of the Statutes of the 1975-76 Regular Session enacting this division, . . . In significant coastal estuarine, habitat, and recreational areas it extends inland to the first major ridgeline paralleling the sea or five miles from the mean high tide line of the sea, whichever is less, . . ." (§ 30103, subd. (a), italics added.)

Section 17 of chapter 1330 of the Statutes of 1976, page 6012, provides: "The coastal zone, as *generally* defined in Section 30103 of the Public Resources Code, shall include the land and water areas as shown on the attached map prepared by the California Coastal Zone Conservation Commission titled 'California Coastal Zone' dated August 11, 1976, and on file with the Secretary of State." (Italics added.) In the area of the subject properties these maps drew the boundary line at the five-mile limit.

c. *The map boundaries control.*

Appellants' complaint alleges the coastal zone boundary is significantly landward of the first major topographic elevation paralleling the sea and therefore inaccurate. They claim the Legislature intended the boundary to be controlled by the topographic ridgeline standard and not by the maps, and allege the Commission's staff intended to mislead the Legislature by preparing the maps in violation of the statute in order to expand improperly the Commission's jurisdiction. We disagree.

The plain language of the statute does not support the contention the topographic standard is superior to the maps. The coastal zone is referred to as *generally* described in words and *specifically* defined by the maps. A well settled rule of statutory construction dictates that the specific must control over the general. (*Estate of Kramme* (1978) 20 Cal.3d 567, 576; *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 637.) Therefore, the boundary established by the maps must preponderate over the verbal description in the statute.

Our conclusion is buttressed by consideration of the same factors relied upon by the trial court. One such factor is an opinion of the Attorney General issued in 1980. "Though clearly not controlling authority, the opinions of the Attorney General are accorded great respect by the courts. [Citations.]" (*Long Beach Police Officers Assn. v. City of Long Beach* (1988) 46 Cal.3d 736, 747.)

The opinion discussed the landward boundary of the coastal zone and concluded "the Legislature clearly intended and did define the landward boundary to be the line depicted on the section 17 maps as subsequently modified by the commission and the Legislature. The quoted words are merely descriptive of the rationale used by the Legislature in drawing the particular line on the maps. [Fn. omitted.]" (63 Ops.Cal.Atty.Gen., *supra*, at p. 111.)

The subsequent modification referred to in the opinion of the Attorney General occurred in 1979. Effective January 1, 1980, the Legislature altered the coastal zone by enacting section 30166 which provides: "In Los Angeles County: [¶] (a) In three

locations within the Santa Monica Mountains, the boundary is moved seaward to the five-mile limit described in Section 30103 and as specifically shown on maps, 22, 23, and 24."

The trial court also took notice of two earlier legislative attempts to modify the boundary of the coastal zone to conform to the line advocated now by appellants. Senator Cusanovich introduced the first, Senate Bill No. 770 (1977-78 Reg. Sess.), on March 31, 1977. The Bill Analysis of Senate Bill No. 770 prepared by the Assembly Committee on Resources, Land Use and Energy reported: "Proponents of SB 770 alleged that an error occurred in drawing the boundary of the Coastal Zone in the Santa Monica Mountains area. Specifically, they contend that the boundary was placed inland at the maximum five mile limit rather than at the 'first major ridgeline' as required by the Coastal Act. The Coastal Commission contends that the boundary was correctly drawn. The Commission acknowledges that the Coastal Zone boundary in the Santa Monica Mountains area was not placed at the *first topographic elevation* landward from the Pacific Ocean. The Commission contends, however, that the term 'ridgeline' does not refer to the first line of topographic elevation, but rather refers to the line which delimits a watershed or drainage area. The land in question is admittedly within the watershed area which drains into the Pacific Ocean."

On November 30, 1977, Senate Bill No. 770 returned from Committee and Assembly without further action.

On December 4, 1978, Senator Cusanovich intorduced a second bill to move the coastal zone boundary seaward in the Santa Monica Mountains area. That bill, Senate Bill No. 39, failed passage in Committee on July 17, 1979, and on November 30, 1980, returned from Assembly without further action.

Appellants argue the position taken by the Commission on Senate Bill No. 770 before the Assembly Committee on Resources, Land Use and Energy shows reliance on the topographic standard stated in the words of the statute. They also argue the 1979 modification of the boundary in Malibu to conform with the five-mile limit reflects the Legislature's intent that the written

description of the boundary controls and not the maps. We disagree.

Neither the Commission's past justification of the boundary shown on the maps nor the Legislature's correction of the maps contradicts the view that the maps properly fix the border of the coastal zone. Rather, this history shows the Legislature twice has had the opportunity to set the coastal zone boundary at the first topographic elevation, but has chosen to leave it as placed in the maps despite an exhibited willingness to make other corrections. Further, it is reasonable to infer the Legislature based its failure to modify the boundary, at least in part, on the Commission's view that the watershed is the critical ridgeline, not the first topographic elevation.

Appellants also complain the trial court erroneously found the maps were available to the Legislature at the time it passed the Coastal Act. They argue the maps did not exist until August 11, 1976. Again, this assertion does not withstand scrutiny.

While the maps are referred to in Statutes 1976, chapter 1330, section 17, as having been dated August 11, 1976, it does not follow they did not exist before that date. Moreover, the Coastal Act did not pass the Assembly until August 13, 1976, and thus the maps were available for use by that body, even if they had not existed before August 11, 1976. Moreover, SB 1277 did not return to the Senate until August 16, 1976, and thus the maps were available during the Senate's final consideration of the bill.

Lastly, appellants point to a selective quotation from the trial court's order and complain it establishes the trial court did not resolve the boundary line issue, but deferred the matter to the Legislature. However, the quotation relied upon by appellants merely prefaced the trial court's resolution of the matter as one of law. Thus, citation to *County of Alpine v. County of Tuolumne* (1958) 49 Cal.2d 787, and the claim the trial court erroneously concluded the judicial system lacked authority to resolve a governmental jurisdictional boundary dispute lacks any basis in the record.

We reiterate our conclusion that the trial court correctly ruled the coastal zone is defined specifically by the maps and only generally in the words of the statute.

2. *Allegedly improper conditions of Piuma property permit.*

a. Quaker waived its right to attack the allegedly improper conditions of the Piuma permit by complying with them.

The complaint concedes Quaker has complied with the conditions imposed by the Commission upon the development of the Piuma property, and that "Quaker was allowed to develop" the land subject to the conditions.

A landowner cannot challenge a condition imposed upon the granting of a permit after acquiescence in the condition by either specifically agreeing to the condition or failing to challenge its validity, and accepting the benefits afforded by the permit. (*County of Imperial v. McDougal* (1977) 19 Cal.3d 505, 510-511.)

Pfeiffer v. City of La Mesa (1977) 69 Cal.App.3d 74, 78, states the rule similarly: "It is fundamental that a landowner who accepts a building permit and complies with its conditions waives the right to assert the invalidity of the conditions and sue the issuing public entity for the costs of complying with them. . . . If the conditions imposed by the city in their permit were invalid, Code of Civil Procedure section 1094.5 provided plaintiffs with the right and procedures to eliminate them. By declining to avail themselves of those procedures, plaintiffs cannot convert that right into a cause of action in inverse condemnation."

Quaker argued, and the trial court found, that the United States Supreme Court case of *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825 [97 L.Ed.2d 677], overruled the *County of Imperial-Pfeiffer* rule. Because the *Nollan* case does not present the issue of waiver, we disagree.

The Nollans leased a beachfront lot situated between two existing public beaches. Their lease contained an option to buy conditioned on demolition of the existing 504 square foot bungalow. In 1982, the Nollans submitted a permit application to the

Commission which proposed replacement of the bungalow with a three-bedroom house similar to those in the neighborhood. The Commission approved the permit on the condition the Nollans grant a public easement to cross over their beachfront.

The Nollans attacked the condition in a petition for writ of administrative mandate and the Ventura County Superior Court remanded the case to the Commission for a full evidentiary hearing. After the Commission again imposed the condition, the Nollans again sought administrative mandamus. The superior court granted the writ and struck the permit condition.

While the Commission's appeal in the Court of Appeal remained pending, "the Nollans satisfied the condition on their option to purchase by tearing down the bungalow and building the new house, and bought the property. They did not notify the Commission that they were taking that action." (*Nollan v. California Coastal Comm'n, supra,* 483 U.S. at pp. 829-830.)

The Court of Appeal reversed the superior court and upheld the permit condition. However, the United States Supreme Court found the easement along the beach bore no relationship to the Commission's stated purpose of improving visual access to the beach, and concluded the permit condition constituted a taking.

Nollan is therefore factually distinguishable from *Pfeiffer* and *County of Imperial.* In both the latter cases, the landowner accepted and complied with the permit conditions. The Nollans, on the other hand, never accepted the public easement condition. To the contrary, they timely fought the condition all the way to the highest court in the land. Although they did build the home which was the subject of the permit proceedings, they did so without notifying the Commission and while their battle with the Commission continued.

Because waiver was neither discussed nor in issue in *Nollan,* the trial court erroneously held *Nollan* abrogated the *County of Imperial-Pfeiffer* rule.

b. *Quaker's failure timely to petition for administrative mandamus to invalidate the assertedly improper conditions on the development of the Piuma property precludes suit for inverse condemnation.*

Quaker concedes it never petitioned for an administrative writ of mandate as required by section 30801 and CCP section 1094.5 to attack the conditions imposed by the Commission on the Piuma property. Quaker now claims its right to allege a "taking" derives from the Fifth Amendment of the federal constitution, and cannot be restricted or restrained by a state rule which requires Quaker first to invalidate the condition.

Quaker bases this argument on the United States Supreme Court decision in *First Lutheran Church [First English] v. Los Angeles County* (1987) 482 U.S. 304 [96 L.Ed.2d 250] which held both temporary and permanent takings require the payment of just compensation. In this regard, *First English* overruled *Agins v. City of Tiburon,* (1979) 24 Cal.3d 266, which held a landowner confronted with an "as applied" regulatory taking could seek to invalidate the regulation by petition for writ of administrative mandate, but could not maintain an action for damages for the temporary taking. (*Agins v. City of Tiburon, supra,* 24 Cal.3d at p. 273; *Taylor v. Swanson* (1982) 137 Cal.App.3d 416, 418.)

First English, however, did not address the *procedural means* by which a claim for inverse condemnation is asserted. It merely held "where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide *compensation for the period during which the taking was effective."* (Italics added.) (*First Lutheran Church v. Los Angeles County, supra,* 482 U.S. at p. 321.)

Thus, although the state can no longer insulate itself from payment of damages for a temporary taking, it does not follow that landowners no longer need to comply with the procedural steps required to contest the action of the administrative agency.

Nonetheless, appellants and amicus curiae urge *First English* requires the elimination of the longstanding rule that landowners must attack actions of the Commission in administrative manda-

mus. In a recently published opinion, the only other court to address this issue concluded a petition for administrative mandate under CCP section 1094.5 remains a necessary predicate to institution of inverse dondemnation proceedings. (*California Coastal Com. v. Superior Court [Ham]* (1989) 210 Cal.App.3d 1488.)[6]

We agree with the *Ham* holding that *State of California v. Superior Court (Veta)* (1974) 12 Cal.3d 237, "must be read as establishing as early as 1974 that an administrative mandate action was a necessary procedural predicate to seeking inverse condemnation damages *based upon a regulatory taking accomplished by an administrative agency.* (*Ham, supra,* 210 Cal.App.3d at p. 1494.) Indeed, even if a departure is in order after *First English,* appellants have not presented a record upon which to make such a change.

In supplemental letter briefs filed after issuance of the *Ham* opinion, appellants have taken the position that *Ham* cannot be harmonized with *First English.* Appellants point out that *Ham* failed to consider the difference in the burden of proof between administrative mandamus and inverse condemnation. They also argue the limited record a landowner is able to create in a Commission proceeding unfairly restricts the matters which can be brought to the attention of the trial court at the mandamus hearing and prevents proof of the elements of inverse condemnation.[7]

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[6]As of the filing date of this opinion *Ham* is final as to the Court of Appeal. However, the period of time in which the parties may seek review in the California Supreme Court has not yet elapsed.

[7]It is well established that a "taking" may occur when land use regulation "goes too far." (*Penna. Coal Co. v. Mahon* (1922) 260 U.S. 393, 415 [67 L.Ed.2d 322, 326].) Although a determination of what constitutes a "taking" under the Fifth Amendment must be made on a case by case basis, the United States Supreme Court has identified three significant factors to be considered. First, the economic impact of the government's action "and, particularly, the extent to which the regulation has interefered with distinct investment-backed expectations. . . ." (*Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104 [124,

Appellants assert: (1) the Commission lacks subpoena power to compel attendance of witnesses; (2) testimony received by the Commission is unsworn and not subject to cross-examination; (3) the Commission lacks a judicial officer to rule on evidentiary questions; and, (4) the Commission typically limits the time allotted for a landowner's presentation.

Drawn into a vacuum of their own making, appellants have requested we take judicial notice of a hearing before the Commission regarding an application to develop the Quaker parcel *unrelated* to these proceedings. We denied the request because the Quaker parcel is no longer in issue here. By failing to proceed as required by law, Quaker has foregone its opportunity to demonstrate the limitations of the administrative process now asserted.

Indeed, as far as can be determined in the absence of a proper record, the rules of chapter 5 of title 14 of the California administrative Code would have afforded Quaker a fair opportunity to be heard and to place sufficient written material in the administrative record to provide an adequate basis upon which thereafter to seek administrative mandate respecting any taking asserted to have resulted from the Commission's ruling.[8]

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57 L.Ed.2d 631, 648].) Second, the nature of the governmental action, i.e., physical invasion versus interference with enjoyment arising from a public program which promotes the public good. *(Ibid.)* And, finally, governmental action which "may be characterized as acquisitions of resoures to permit or facilitate uniquely public functions have often been held to constitute 'takings.' " (*Id.*, at p. 128.)

On the other hand, "land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land,' [citations]." (*Nollan v. California Coast Comm'n, supra*, 483 U.S. at p. 834.)

[8]For example, section 13064 of the California Administrative Code states a "public hearing on a permit matter shall be conducted in a manner deemed most suitable to ensure fundamental fairness to all parties concerned, and with a view toward securing all relevant information and material necessary to render a decision without unnecessary delay."

Moreover, the present procedure for administrative mandate has not prevented landowners from proving conditions imposed by the Commission have been excessive or invalid. (E.g., *Nollan v. California Coastal Comm'n, supra,* 483 U.S. at p. 837; *Liberty v. California Coastal Com.* (1980) 113 Cal.App.3d 491, 504.) Other litigants who have attacked permit conditions have not been unsuccessful because of any paucity of evidence before the trial court, but because a constitutionally sufficient nexus has been found to exist between the benefit conferred on the applicant and the burden imposed on the public. (E.g., *Paoli v. California Coastal Com.* (1986) 178 Cal.App.3d 544, 552-553; *Whaler's Village Club v. California Coastal Com.* (1985) 173 Cal.App.3d 240, 251-261; *Grupe v. California Coastal Com.* (1985) 166 Cal.App.3d 148, 171-177; *Remmenga v. California Coastal Com.* (1985) 163 Cal.App.3d 623, 627-630.)

Further, an action for inverse condemnation is a two-step proceeding in which the trial court first sits as the trier of law and fact and determines whether the plaintiff has suffered a "taking." (*Lussier v. San Lorenzo Valley Water Dist.* (1988) 206 Cal.App.3d 92, 107.) Because the landowner is not entitled to a jury on this issue in any event, the effect of any deficiency in the record is mollified.

In appropriate circumstances, the trial court has a mechanism available whereby the administrative record may be augmented.

Section 13065 of the California Administrative Code provides in part: "Any relevant evidence shall be considered if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions."

California Administration Code section 13067 states, "[S]peakers' presentations shall be to the point and shall be as brief as possible; visual and other materials may be used as appropriate. The commission may establish reasonable time limits for presentation(s); . . ."

California Administrative Code section 13074 provides in part: "[A]ny interested party may submit written evidence including rebuttal arguments, to the commission."

CCP section 1094.5, subdivision (e), allows the trial court to remand the matter to the administrative agency to reconsider the case in light of evidence "which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before respondent, . . . ; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit the evidence at the hearing on the writ without remanding the case."

Based upon the present record, it can only be concluded that any asserted inability on the part of Quaker to present its constitutional claim adequately in the context of a CCP section 1094.5 hearing is self-inflicted, and not properly before this court because Quaker never bothered to create the necessary record. We have no transcript of the hearing before the Commission and no trial court record from which we might have found Quaker's claims had merit.

While we recognize there are evidentiary limitations inherent in the mandamus procedure, there simply is no way of knowing, based upon the present record, whether a hearing conducted in accordance with chapter 5 of title 14 of the California Administrative Code would, or would not, have allowed Quaker adequately to present its claims. Until the long standing statutory scheme defined by section 30801 and CCP section 1094.5 has been tested properly, we are reluctant to find it inadequate.

We therefore conclude Quaker has failed to show the present procedure of asserting the invalidity of permit conditions through a petition for writ of administrative mandate is not a fair forum.

Moreover, the well established procedures should be given a chance to work following *First English*. There has been no showing that a mandamus proceeding joined with an action for inverse condemnation is not effective. To the contrary, that is precisely what occurred with respect to the Quaker parcel. Thus, the issue appellants seek to raise here properly will be presented in that case, or another in a similar procedural posture. In the interim, enactments by the Legislature to alleviate the asserted evidentiary shortcomings are appellants only available relief.

Appellants and amicus next urge *Ham* is not in step with other cases which have considered the application of *First English*. However, the cases relied upon speak in dicta and involve either a direct physical taking (*Sinaloa Lake Owners Ass'n v. City of Simi Valley* (9th Cir. 1989) 864 F.2d 1475), or as ordinances assertedly invalid on its face (*Mira Development Corp. v. City of San Diego* (1988) 205 Cal.App.3d 1201, 1220, fn. 11).

Appellants next argue that consideration of *First English* by Division 7 of this court on remand from the United States Supreme Court supports their view. They quote *First English Lutheran Church v. County of Los Angeles* (1989) 210 Cal.App.3d 1353, 1359, as follows: "The Supreme Court held monetary damages indeed can be sought as an initial remedy for 'inverse condemnation' claims based on unconstitutional 'regulatory takings.' " However, even on remand *First English* does not address procedural requirements and, in any event, involves an ordinance, not an administrative ruling.[9]

Finally, appellants assert their allegations of denial of due process, as opposed to inverse condemnation claims, must be allowed to proceed.[10] They rely on *Sinaloa Lake* for this proposition. However, *Sinoloa Lake* discusses exhaustion of state compensation claims before institution of federal compensation claims, and is not in point. Regardless of whether Quaker pleads its cause of action as one for inverse condemnation or as a denial of due process, the essential underpinning of its recovery is the invalidity of the administrative action. That action must be reviewed by petition for writ of administrative mandate. Failure to do so renders the administrative action immune from collateral attack. (*Ham, supra,* 210 Cal.App.3d at p. 1496.)

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[9]A petition for review filed July 3, 1989, in *First English* is pending presently before the California Supreme Court (case no. S010941).

[10]A denial of substantive due process differs from an inverse condemnation claim in that it seeks to assert failure of the restriction reasonably to relate to a legitimate governmental purpose. (*Nollan, supra,* 483 U.S. at pp. 834-835, fn. 3; *Grupe v. California Coastal Com., supra,* 166 Cal.App.3d at pp. 168-169; see also, Nichols, The Law of Eminent Domain (Rev. 3d ed. 1988.) § 4.9, p. 4-52.)

We restate our conclusion *First English* did not obviate the rule that a landowner must petition for a writ of administrative mandate to contest conditions imposed by the Commission. Thus, in addition to our finding Quaker has waived its right to sue with respect to the Piuma property by complying with the conditions of the permit issued, Quaker also has failed to attack the conditions imposed by the Commission in a timely manner. On this additional ground, the trial court properly sustained respondents' demurrer without leave to amend.

4. *The State and state agencies are not "persons" within the meaning of 42 United States Code section 1983.*

Appellants' complaint alleges the Commission "at all times relevant hereto acted as an agent, division and governmental arm of the defendant-respondent STATE OF CALIFORNIA."

"It is settled law that a state and its agencies are not 'persons' within the meaning of section 1983. (*Alabama v. Pugh* (1978) 438 U.S. 781, 782, [57 L.Ed.2d 1114, 1116, 98 S.Ct. 3057] [state and State Board of Corrections]; *Taylor v. Mitzel* (1978) 82 Ca.App.3d 665, 670 [147 Cal.Rptr. 323]." (*Mezey v. State of California* (1984) 161 Cal.App.3d 1060, 1065; *Pyne v. Meese* (1985) 172 Cal.App.3d 392, 405; *Bennett v. People of State of California* (9th Cir. 1969) 406 F.2d 36, 39.)

The distinction between local government units which are not part of the State and "States or governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes" was recently addressed in *Will v. Michigan* (1989) ____ U.S. ____, ____, 105 L.Ed.2d 45, ____, 57 U.S.L.W. 4677, 4680. The high court concluded "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." (*Ibid.*)

Nothing in *Lake County Estates v. Tahoe Planning Agency* (1978) 440 U.S. 391 [59 L.Ed.2d 401], requires a different result. The Tahoe Planning Agency is a bi-state agency and not an arm of a state. Because it is a separate legal entity, it is not entitled to protection under the Eleventh Amendment. Similarly, a municipality is not immune from a federal civil rights suit.

(*Monell v. New York Dept. of Social Services* (1978) 436 U.S. 658, 663 [56 L.Ed.2d 611, 619].)

Because the Commission is clearly a state agency, it is immune from prosecution under 42 United States Code section 1983.

The trial court properly dismissed the civil rights causes of action without leave to amend.

CONCLUSION

The trial court properly ruled the coastal zone boundary is established by the maps referred to in the Coastal Act. Quaker cannot now attack the conditions imposed on the development of the Piuma property because it complied with them, and failed to exhaust its administrative remedies by filing an action for administrative mandamus before, or in conjunction with, its claim for inverse condemnation. The State and its agencies are not persons for the purpose of federal civil rights suits under 42 United States Code section 1983.

DISPOSITION

The judgment is modified by sustaining without leave to amend respondents' demurrer to the ninth through twelfth causes of action on the ground Quaker has waived the right to attack the permit conditions by complying with them and, as so modified, the judgment is affirmed.

Respondents to recover costs on appeal.

CERTIFIED FOR PUBLICATION

KLEIN, P.J.

We concur:

DANIELSON, J.

ARABIAN, J.

APPENDIX B

ORDER DENYING REVIEW, CALIFORNIA SUPREME COURT, FILED NOVEMBER 2, 1989

B-2

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

SECOND APPELLATE DISTRICT,
DIVISION THREE,
NO. B035188 S011858

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

IN BANK

ROSSCO HOLDINGS, Etc. Et Al.,
Appellants,

VS.

STATE OF CALIFORNIA, Etc. Et Al.,
Respondents.

Appellants' petition for review DENIED.

Filed: Nov. 2, 1989

Robert Wandruff, Clerk
Supreme Court Deputy

LUCAS
Chief Justice

Supreme Court, U.S.
FILED
MAR 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1314

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROSSCO HOLDINGS INCORPORATED,
a California Corporation,
d.b.a. QUAKER CORPORATION,
MICHAEL T. GHOSN,

Petitioners,

vs.

STATE OF CALIFORNIA,
CALIFORNIA COASTAL COMMISSION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION THREE

BRIEF OF GRIFFIN HOMES, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

MICHAEL M. BERGER
Counsel of Record

of FADEM, BERGER & NORTON
A Professional Corporation

12424 Wilshire Boulevard
Post Office Box 250050
Los Angeles, California 90025
(213) 207-2727

Attorneys for Amicus Curiae
Griffin Homes, Inc.

Lawyers Brief Service / Legal Printers / (213) 383-4457 / (714) 720-1510

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MICHAEL M. BERGER
Counsel of Record

of FADEM, BERGER & NORTON
A Professional Corporation

12424 Wilshire Boulevard
Post Office Box 250050
Los Angeles, California 90025
(213) 207-2727

Attorneys for Amicus Curiae
Griffin Homes, Inc.

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CALIFORNIA COASTAL COMMISSION,

Respondents.

BRIEF OF GRIFFIN HOMES, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

By agreement of counsel for the parties, whose letters of consent have been filed with this Court's Clerk, Griffin Homes, Inc. files this brief as *amicus curiae* in support of the Petitioners.

INTEREST OF AMICUS CURIAE

Griffin Homes, Inc. is a California corporation engaged in the building of homes.

Griffin is presently in litigation over the constitutionality of a "growth limitation" ordinance adopted by the City of Simi Valley, California. (*Griffin Homes, Inc. v. City of Simi Valley,* Ventura County case no. 107352) In that litigation, Griffin seeks compensation for a regulatory taking of its property because the operation of the City's ordinance denies Griffin economically viable use of its property and interferes with its reasonable, investment backed expectations. The City is seeking to dismiss Griffin's complaint, in part because of the holding of the Court of Appeal in the case at bench, *i.e.*, because Griffin did not first seek a writ of "administrative mandamus" to invalidate the actions of the City.

Griffin thus has a vital interest in the outcome of this litigation as, in a substantial way, its litigational posture will be directly affected by this case.

INTRODUCTION

The California courts are at it again.

In 1987, this Court sent not one, but two unequivocal messages to the California judiciary that it was failing to provide the protection of property owners mandated by the Fifth Amendment. (*First English Evangelical Lutheran Church v. County of Los Angeles* [1987] 482 US 304; *Nollan v. California Coastal Commn.* [1987] 483 US 825) This Court's analysis of the lack of

protection provided property owners by the California courts[1] bore out the analysis of text writers and commentators who had long and frequently noted the unfairness of California property law. As Richard Babcock and Charles Siemon, long-time, national practitioners of land use law, pungently expressed it:

> "What *can* one say about the California courts other than that one has to be a madman to challenge a government regulation in that bizarre jurisdiction?
>
> * * *
>
> "California has always been notorious for being the first jurisdiction to sustain extreme municipal regulations. Practitioners in other states have joked about why a developer would sue a California community when it would cost a lot less and save much time if he simply slit his throat."[2]

Instead of heeding this Court's doubly reinforced message in *First English* and *Nollan*, the California

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[1] In *First English*, this Court told California:

> "... the California courts have decided the compensation question inconsistently with the requirements of the Fifth Amendment." (482 US at 311)

In *Nollan*, this Court told California:

> "Our conclusion on this point is consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts." (483 US at 839)

[2] R. Babcock & C. Siemon, The Zoning Game Revisited (1985) 257, 293; emphasis in original.

courts have erected new roadblocks in the path of property owners seeking the protection this Court intended by those decisions.

The case at bench is a paradigmatic illustration of California's thumbing its nose at this Court's decisions. Rather than dealing forthrightly with an extortionate exaction by *the same agency* rebuked by this Court in *Nollan*, and either invalidating the conditions or compelling compensation for the property taken, the California Court of Appeal created a new precondition to a property owner's ability to seek the aid of the "self-executing" Just Compensation Clause[3] of the Fifth Amendment: *before* seeking compensation for a regulatory taking, the property owner must file a separate suit to *invalidate* the regulation. (*Rossco Holdings Inc. v. State* [1989] 212 Cal App 3d 642, 656)

That holding not only flies in the face of both *First English* (in which a suit for compensation was filed immediately after the regulation was adopted, with no challenge to the regulation's validity)[4] and *Nollan* (in

---

[3] As this Court put it in *First English*:

> "We have recognized that a landowner is *entitled* to bring an action in inverse condemnation as a result of the self-executing character of the constitutional provision with respect to compensation . . . . [T]he Court has frequently repeated the view that, in the event of a taking, the compensation remedy is *required* by the Constitution." (482 US at 315, 316; quoting with approval; internal quotation marks deleted)

[4] The County moved to dismiss the *First English* appeal because the property owner had failed to attack the validity of its regulations on grounds other than the absence of compensation. This Court denied the motion. (482 US at 314 n. 8)

which the property owner accepted the benefit of the permit while simultaneously challenging the extortionate condition in court), but also this Court's recent decision in *Preseault v. I.C.C.* (1990) ___ US ___, 58 USLW 4193.

In *Preseault*, this Court forcefully concluded that the proper rule is exactly the opposite of the new California rule: *before* seeking to invalidate a regulation on the ground that it is a taking, the property owner *must* seek compensation under the Fifth Amendment. As this Court concluded, "In sum, petitioners' failure to make use of the available [inverse condemnation] remedy renders their taking challenge to the ICC's order premature." (58 USLW at 4197)

As this Court has decided — as a matter of paramount federal Constitutional law — that compensation must be *first* sought and denied before a property owner may sue to invalidate governmental action as a regulatory taking of property, then California is not at liberty to invert that rule and require the property owner to *first* seek to invalidate the regulation.

This is no mere "procedural" difference, as the California Court of Appeal held at bench. (*Rossco*, 212 Cal App 3d at 656) It is the very heart of the Fifth Amendment issue: this Court held that a property owner cannot challenge the validity of a regulation without first seeking compensation, while the California courts held that a property owner cannot seek compensation without first challenging the validity of the regulation. The two "rules" cannot coexist.

In the last decade, this Court has spent considerable time and effort in attempting to outline the basic Constitutional rules applicable to dealings between property owners and property regulators. Many of the cases on which this Court has toiled have arisen in California.

Whether this Court's considered decision-making is to bring real world protection depends on how its decisions are applied by lower courts. The "application" demonstrated in the case at bench is outrageous. It is a defiance of this Court's decisions. Lower courts are able to act this way out of a belief that this Court's limited time will preclude review of their actions.

The decision below deserves this Court's swift repudiation.

Because the decision below is so plainly in conflict with this Court's decisions — particularly *First English*, *Nollan*, and *Preseault* — this case seems appropriate for a summary reversal and remand to the California Court of Appeal with instructions to reconsider its decision in light of the paramount decisions of this Court.

SUMMARY OF THE CASE

The case at bench is an effort by a property owner who was victimized by action of the California Coastal Commission similar to that struck down by this Court in *Nollan* as "extortion" (483 US at 837) to obtain compensation for what the same Coastal Commission unlawfully took from him. Until this Court struck down that condition in *Nollan* and held in *First English* that the Constitutionally-mandated remedy for an unconstitutional taking was compensation, the property owner in this case had no inverse condemnation cause of action in California. (*See Agins v. City of Tiburon* [1979] 24 Cal 3d 266; *overruled by First English.*) Thus, when the action below was filed *after* those two landmark decisions, it was filed at the earliest meaningful time. Before those decisions by this Court, no California court would have entertained the suit.

Fundamentally, what the Coastal Commission has done in this case is to prevent development UNLESS the property owner pays $297,500 to an environmental group and "dedicates"[5] vast acreage to the public. If the Commission had simply denied any use to the property owner, there is little question but that a taking of the entire ownership would have occurred. The grant of a permit accompanied by extortionate conditions precedent causes the same Constitutional taking.

A similar problem was recently analyzed by New York's highest court in *Seawall Associates v. City of New York* (1989) 74 NY 2d 92. There, in an attempt to help with New York City's homeless problem, the city passed an ordinance requiring the owners of single-room-occupancy hotels to fully maintain and rent all their rooms. Fines would be levied for non-compliance. Like the conditions at bench, the New York ordinance attempted to provide an escape valve. For the payment of money, an owner could escape from the terms of the ordinance. Relying, among other things, on *First English* and *Nollan*, New York's highest court struck down the scheme. Of interest here is its treatment of the conditions intended to ameliorate the taking:

> "If, as we hold, the effect of the moratorium and anti-warehousing measures is unconstitutionally to deprive owners of their basic rights to possess and to make economically viable use of their properties, merely allowing them to purchase exemptions from the law cannot alter this conclu-

[5] Eschewing label games, this Court's decision in *Nollan* makes clear that the "giving" of this property interest was in no sense a "voluntary" act of the property owner. (483 US at 834, n. 2)

> sion. In effect, the city, in the buy-out and replacement exemptions, is saying no more to the owners than that it will not do something unconstitutional if they pay the city not to do it. But if the initial act amounts to an unlawful taking, then permitting the owners to avoid the illegal confiscation by paying a 'ransom' cannot make it lawful. Indeed, the stark alternatives offered by Local Law No. 9 — either submit to an uncompensated and, therefore, unconstitutional appropriation of your properties or pay the price (in cash or in replacement units) — amount to just the sort of exaction which could be classified, not as 'a valid regulation of land use but, "an out-and-out plan of extortion." [Citation.]' [Citations.]" (*Seawall*, slip op, pp 23-24)

The same is true here. What the Coastal Commission is attempting to cover up by its conditions prerequisite to development approval is a use prohibition which would violate the Constitution. Permitting the property owner to — in the words of the New York Court of Appeals — "ransom" his way out of that unconstitutional situation cannot be countenanced.

The direct conflict between the approaches of the California and New York courts on the question of "ransom" merits this Court's intervention.

THE CALIFORNIA COURTS HAVE THUMBED THEIR NOSES AT THIS COURT'S DECISIONS

The Court of Appeal's decision is based on the fundamental misconception that a challenge to the *validity* of a governmental action through administrative mandamus is the same as an inverse condemnation action which *accepts* the operation of that governmental action and challenges its Constitutionality because it takes property without compensation.

The two are not the same, as this Court has often held. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 US 419, 425, in which this Court evaluated a statute designed to facilitate cable television communication:

> "The Court of Appeals determined that §828 serves the legitimate public purpose of 'rapid development of and maximum penetration by a means of communication which has important educational and community aspects,' and thus is within the State's police power. We have no reason to question that determination. *It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid.*" (Emphasis added.)

(*See also Kaiser Aetna v. U.S.* [1979] 444 US 164, 174; *U.S. v. Security Indus. Bank* [1982] 459 US 70.)

As this Court put it in *First English*:

> "[The Fifth Amendment] is designed not to limit the governmental interference with property rights per se, but rather *to secure compensation in the event of otherwise proper interference amounting to a taking.*" (482 US at 315; emphasis added.)

In this Court's recent *Preseault* decision, that passage from *First English* was the basis for both the majority and concurring opinions.

Equally important, the Court of Appeal has misunderstood *First English* as requiring (or permitting a state to require) a property owner to *first* establish the invalidity of a government regulation through the mandamus process before seeking compensation for the taking wrought by the regulation.

That is *not* what happened in *First English*. There, no action was pursued to determine the police power validity of the County's action. Nonetheless, this Court held that the property owner was entitled to a determination of whether the regulation took its property.

That conclusion was compelled by this Court's Constitutional analysis. Please recall that *First English* concluded:

> ". . . government action that works a taking of property rights *necessarily* implicates the 'constitutional obligation to pay just compensation.' [Citation.]
>
> "We have recognized that a landowner is *entitled* to bring an action in inverse condemnation as a result of ' "*the self-executing character of the*

> *constitutional provision with respect to compensation . . .*" ' [Citations.]" (482 US at 315; emphasis added.)

A remedy which is "self-executing" because violation of the Just Compensation Clause "necessarily" invokes it cannot be frustrated by any state procedure which requires a mandamus action to invalidate the regulation as a precondition to invocation of the "self-executing" remedy. By definition, a "self-executing" Constitutional remedy cannot be precluded by legislative action or inaction. (*First English*, 482 US at 316)

California's evisceration of the just compensation remedy which this Court has plainly and repeatedly held to be the primary and fundamental remedy for a regulatory taking of property is so at odds with this Court's paramount decisions interpreting the Fifth Amendment that immediate reversal and remand for reconsideration in light of this Court's decisions is appropriate.

THE "WAIVER" ISSUE WAS SQUARELY BEFORE THIS COURT IN *NOLLAN*

The trial court in this case concluded that *Nollan* abrogated the rule that a permit applicant cannot accept the permit and simultaneously sue to invalidate some of its conditions. In reversing, the Court of Appeal said that ". . . waiver was neither discussed nor in issue in *Nollan* . . ." (*Rossco*, 212 Cal App 3d at 656) The Court of Appeal is wrong in so saying. The issue was expressly raised and briefed in this Court in *Nollan*:

- In its motion to dismiss the appeal, the Coastal Commission entitled one of

its two substantive arguments: "APPELLANTS HAVE WAIVED THE RIGHT TO CHALLENGE THE ACCESS CONDITION UNDER STATE LAW BY CONSTRUCTING THE DEVELOPMENT PRIOR TO FINAL ADJUDICATION OF THIS MATTER."

- In its brief on the merits, the Coastal Commission used the same caption for a subheading of its argument that "THIS COURT LACKS JURISDICTION TO HEAR THIS CASE."

Thus, the Court of Appeal erred in its understanding of the procedural posture of *Nollan*. That error led to the erroneous attempt to distinguish *Nollan* aptly described in the Petition at bench. This Court was well aware of the "waiver" argument and concluded that it posed no bar to relief.

CONCLUSION

It seems evident that California's appellate courts do not like this Court's 1987 decisions in *First English* and *Nollan*. As the opinion in this case indicates, they are bending their considerable intellect to defeat property owners who seek the protection of this Court's decisions.

In light of *Williamson County Reg. Planning Commn. v. Hamilton Bank* (1985) 473 US 172, requiring regulatory taking cases to be brought in state (rather than federal) courts, this Court's supervision of how the state courts apply the federal constitutional law of takings is indispensable for all participants in land use planning

and regulation. Without clear guidance from this Court, confusion, unfairness, and anarchy will reign. That harms all and benefits none. California's intransigence breeds unpredictable litigational results, undermining confidence in the judicial system. This Court's decisions deserve respect, not what is demonstrated by the decision below. In the guise of applying this Court's decisions, the California Court of Appeal has eviscerated them.

An astute commentator had the following to say about the legacy which this Court created in *First English*:

> "What the decision did accomplish may be best described as a leveling of the playing field on which regulators and landowners contend. While compensation was unavailable when regulations took away the use of property, landowners were at a fundamental disadvantage in attempting to protect their constitutionally guaranteed property rights. *Regulators faced no real penalty for trampling on those rights, and behaved accordingly . . .*
>
> "The *First English* ruling has also insured an ultimate protection for individual property rights against violation by the government through regulations. That *revitalization of constitutional guarantees* is the most fundamental meaning of the case. *First English* stands as a reminder that even ends which benefit society do not justify means forbidden by the Constitution as unfair to individuals. Its reaffirmation of *the mutually*

> *dependent relationship between liberty and property* which lies at the heart of the fifth amendment may in the end prove to be its most significant message." (Comment, *He Who Calls the Tune Must Pay the Piper: Compensation for Regulatory Takings of Property After First English Evangelical Lutheran Church v. County of Los Angeles* [1988] 53 Mo L Rev 70, 120; emphasis added.)

In contrast to that commentator, the California Court of Appeal has contorted the "fundamental meaning" of this Court's 1987 decisions. Without this Court's action, Californians will be without the benefits of the Just Compensation Clause.

Because the decision below is so in conflict with this Court's recent decisions (particularly *First English, Nollan*, and *Preseault*) the appropriate result would seem to be an immediate, summary reversal with intructions that the California Court of Appeal reconsider its decision in light of this Court's controlling interpretations of the Fifth Amendment.

Respectfully submitted,

MICHAEL M. BERGER
of FADEM, BERGER & NORTON

Attorneys for Amicus Curiae
Griffin Homes, Inc.

No. 89-1314

(3)

Supreme Court, U.S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1989

ROSSCO HOLDINGS INCORPORATED,
a California Corporation
d.b.a. QUAKER CORPORATION,
MICHEL T. GHOSN,
Petitioners,
VS.
STATE OF CALIFORNIA,
CALIFORNIA COASTAL COMMISSION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA SECOND APPELLATE DISTRICT, DIVISION THREE

RESPONDENTS' BRIEF IN OPPOSITION

JOHN K. VAN DE KAMP
Attorney General
N. GREGORY TAYLOR
Assistant Attorney General
ANTHONY M. SUMMERS
DENNIS M. EAGAN
Supervising Deputy Attorneys General
*STEVEN H. KAUFMANN
Deputy Attorneys General
3580 Wilshire Boulevard
Los Angeles, California 90010
Telephone: (213) 736-2136
Attorneys for Respondents State of California and California Coastal Commission

**Counsel of Record*

Bowne of Los Angeles, Inc., Law Printers (213) 742-6600

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QUESTIONS PRESENTED

(1) Whether the California Court of Appeal, applying state law, correctly rejected petitioners' challenge to the State coastal zone boundary, given that the boundaries of the coastal zone have been specifically defined by the California Legislature by adopted maps and petitioners' properties concededly lie within the boundaries as depicted on those maps.

(2) Whether the California Court of Appeal correctly refused to decide a claim of constitutional inadequacy in the Coastal Commission's adjudicatory hearing process, given that the issue was never raised before the trial court or upon a proper record when finally presented to the appellate court.

(3) Whether the California Court of Appeal correctly decided, applying state law, that petitioner Quaker waived its right to attack the validity of conditions imposed on a grant of subdivision approval and sue for damages, given that Quaker concededly accepted the benefits of the permit issued and complied with the conditions.

(4) Whether the California Court of Appeal correctly rejected Quaker's suit for damages under principles of res judicata, given that Quaker failed to attack in administrative mandamus the validity of the adjudicatory decision approving its subdivision request or the conditions imposed thereby.

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No. 89-1314

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

ROSSCO HOLDINGS INCORPORATED,
a California Corporation
d.b.a. QUAKER CORPORATION,
MICHEL T. GHOSN,
Petitioners,

vs.

STATE OF CALIFORNIA,
CALIFORNIA COASTAL COMMISSION,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

Respondents State of California and California Coastal Commission respectfully request that this Court deny the petition for writ of certiorari seeking review of the opinion of the California Court of Appeal in this case. That opinion is reported at 212 Cal.App.3d 642 (1989).

JURISDICTION

Petitioners purport to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(a). However, jurisdiction is lacking for three reasons.

First, petitioners' state coastal zone boundary challenge proceeded in the courts below on pure issues of state law. The assertion that the State Legislature's manner of including petitioners' properties in the coastal zone violated due process was neither raised nor decided in the state court proceedings below.

Second, the issue of claimed constitutional inadequacies in the hearing process of the respondent Commission was not decided in the proceedings below because it was never raised before the trial court and because no proper record was presented when it was finally raised in the State Court of Appeal.

Finally, review of the remaining federal questions asserted is foreclosed because the Court of Appeal, in deciding that petitioner Quaker waived its right to attack the validity of conditions imposed on its subdivision approval and sue for damages, proceeded on an independent and adequate state ground sufficient, by itself, to maintain the judgment below.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Fourteenth Amendments to the United States Constitution are pertinent to this case, as well as sections 17 and 30103(a) of the California Coastal Act of 1976 (Cal. Public Resources Code, § 30000 et seq.).

STATEMENT OF THE CASE

Petitioners Rossco Holdings Inc. (dba "Quaker Corporation") and Michel Ghosn ("Ghosn") own three

unrelated, undeveloped properties in the Malibu-Santa Monica Mountains area of the County of Los Angeles, California. Quaker owns two of those properties, the 272-acre "Mulholland" property and the 102-acre "Piuma" property. Ghosn owns the third, the 160-acre "Ghosn" property.

In July 1983, the California Coastal Commission ("Commission") approved Quaker's application for a 22-lot subdivision of the Piuma property. The approval was made subject to conditions requiring recordation of an offer to dedicate an open space easement and the purchase of 21 transferable development credits ("TDCs") to offset the cumulative effects associated with the new lots created. Though not disclosed by the complaint filed or petition to this Court, the conditional approval enabled the Commission to approve a 22-lot subdivision, rather than a subdivision of eight lots as permitted by the Area Plan. Resps. & Cr.-Apps' Reqt. for Jud. Notice, Exh. 1. Quaker accepted the coastal development permit authorizing the subdivision which was issued in July 1985 and thereafter, but prior to filing this suit, it fully satisfied both conditions.[1/]

1. The petition states the TDCs were purchased from an "environmental group." Pet. at 2. In fact, they were purchased from a non-profit entity implementing a lot consolidation program in the Santa Monica Mountains established by another state agency, the California Coastal Conservancy.

The petition also erroneously states that "[a]t the time this lawsuit was filed, Quaker was still making installment payments on the $297,500 exaction, while the required 'offer to dedicate' its landholding was still pending but had not yet [sic] accepted by a government entity . . . ." Pet. at 3. The complaint,

On September 29, 1987, some four years after the Commission's conditional approval, Quaker and Ghosn jointly filed the underlying action. Although several different claims are stated, only two remain pertinent here. The first, a claim for damages, mandate and declaratory relief, involves a challenge by both Quaker and Ghosn to the location of the State "coastal zone" boundary established by the California Legislature in enacting the Coastal Act of 1976. The second concerns a challenge by Quaker to the Commission's 1983 approval of its Piuma subdivision. It seeks interim damages under various theories based on a claim that the conditions of approval Quaker accepted constitute an unlawful taking in violation of the "Just Compensation" Clause of the Fifth Amendment.

In November 1987, a coalition of 16 homeowner groups intervened in the action to oppose the relief sought by the complaint.

On January 5, 1988, respondents demurred to all causes of action pleaded in the complaint. On April 27, 1988, with one exception, the trial court sustained respondents' demurrers without leave to amend.

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which was filed in September 1987, alleged that, as to the TDC requirement, "[a]ll of said sums have been paid by QUAKER to the Mountains Restoration Trust, with the last and final payment paid under protest in or about August 1987." Joint Appendix ("Jt. App.") #6, Complaint ¶ 64 (A). As to the dedication requirement, Quaker alleged that it "has recorded an offer to dedicate an open space easement but the same has not yet been accepted by a government [sic] and thus the offer remains open and pending." Ibid., ¶ 64 (B).

Petitioners appealed from the order of dismissal and judgment. The Commission filed a cross-appeal to preserve its ability to argue the one ground for demurrer overruled by the trial court as a further reason for affirmance.

In a published opinion filed on July 26, 1989, the California Court of Appeal for the Second Appellate District, Division Three, reversed on the Commission's cross-appeal and affirmed the judgment, as modified, holding, as pertinent here:

(1) The boundaries of the State's "coastal zone" have been specifically defined by maps adopted by the California Legislature, and petitioners' properties concededly lie with the boundaries as depicted on those maps;

(2) Under settled state law, by accepting the benefits of the "Piuma" permit and complying with the conditions imposed, Quaker waived its right to later attack assertedly "improper" conditions;

(3) Apart from waiver, Quaker's failure to timely petition for administrative mandamus to invalidate the conditions, under applicable state court procedures and principles of res judicata, precludes suit in inverse condemnation seeking interim damages; and

(4) Quaker failed to present a proper record by which the Court might review the constitutional adequacy of the State's administrative mandamus process relative to the Commission's 1983 decision on Quaker's "Piuma" permit.

On November 2, 1989, the California Supreme Court denied a petition for review.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE COURT LACKS JURISDICTION OVER THE QUESTION CONCERNING THE STATE COASTAL ZONE BOUNDARY BECAUSE IT WAS NEITHER RAISED NOR DECIDED IN THE STATE COURT PROCEEDINGS BELOW

The petition attempts for the first time to convert what was a pure question of state law before the state courts into a federal question. Petitioners Quaker and Ghosn below jointly challenged the location of the State "coastal zone" boundary in the area of their respective properties in the Santa Monica Mountains. There was no dispute that the coastal zone boundary maps adopted by the California Legislature show their properties to be well within the coastal zone. Instead, petitioners contended that the State Legislature intended the boundary, as defined in the Coastal Act of 1976, to be controlled by a topographic ridgeline (seaward of their properties) and not the maps, and that the Commission's staff misled the Legislature by preparing the maps in violation of statute in order to improperly expand the agency's jurisdiction.

The petition now reframes the issue in an effort to pose a federal question. Petitioners assert they were denied due process because they received no hearing or

notice from the State Legislature before their properties were included in the coastal zone. While the argument offered in the petition addresses almost exclusively state court issues of statutory interpretation, the due process argument reveals itself for the first time at the end of the argument in two brief sentences. Pet. at 22.

This Court has consistently refused to decide federal constitutional questions raised before it for the first time on review of a state court decision. Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). For jurisdiction to obtain, the question presented must have been raised and decided in the state court below. Hill v. California, 401 U.S. 797, 805 (1971).

The due process question now asserted was never raised, briefed, argued or passed upon in the trial or appellate courts. It is, therefore, not properly reviewable in this Court.

Even addressing the argument, moreover, it has no merit. A host of cases squarely reject any constitutional right of notice and hearing preceding the enactment of legislation. Bowles v. Willingham, 321 U.S. 503, 519 (1944); Bi-Metallic Co. v. Colorado, 239 U.S. 441, 445 (1915).

Finally, the State Court of Appeal correctly decided the state issues argued by petitioners. The California "coastal zone" boundary was established by the State Legislature over 14 years ago as part of its enactment of the California Coastal Act of 1976. California Public Resources Code section 30103, subdivision (a), defines the State "coastal zone" as follows:

> "'Coastal zone' means that land and water area of the State of California from the Oregon border to the border of the Republic of Mexico, specified on the maps identified and set forth in Section 17 of that chapter of the Statutes of 1975-1976 Regular Session enacting this division, extending seaward to the state's outer limit of jurisdiction . . . and extending inland generally 1,000 yards from the mean high tide line of the sea. In significant coastal estuarine, habitat, and recreational areas it extends inland to the first major ridgeline paralleling the sea or five miles from the mean high tide line of the sea, whichever is less and in developed urban areas the zone generally extends inland less than 1,000 yards . . . ." (Emphasis added.)

Section 17 of chapter 1330 of the California Statutes of 1976, as amended by section 29 of chapter 1331 of the Statutes of 1976, in turn provides:

> "The coastal zone, as generally defined in Section 30103 . . . shall include the land and water areas as shown on the map prepared by the California Coastal Zone Conservation Commission titled "California Coastal Zone" dated August 11, 1976, and on file with the Secretary of State." (Emphasis added.)

The argument below, and again here, is that the maps are invalid because the State Legislature intended the boundary to be controlled by a topographic ridgeline and not the maps. The flaw in the argument is that it ignores the plain language of Public Resources Code section 30103, subdivision (a), and, in particular, section

17. Read together, these provisions refer to the coastal zone as generally described in words and specifically defined by the maps. Applying settled rules of statutory construction that the specific must control over the general (Estate of Kramme, 20 Cal.3d 567, 576 (1978)), the Court of Appeal concluded that "the boundary established by the maps must preponderate over the verbal description in the statute." Pet. at A-10. The plain language of the two provisions, two failed legislative attempts to modify the boundary in the manner urged by petitioners, and an opinion by the State Attorney General reaching the identical conclusion on the very issue some nine years earlier in 1980 readily confirm that the Court was correct in its conclusion.

II.

THE COURT LACKS JURISDICTION CONCERNING ASSERTED CONSTITUTIONAL INADEQUACIES IN THE COMMISSION'S HEARING PROCESS BECAUSE THE ISSUE WAS NEVER RAISED BEFORE THE TRIAL COURT OR RAISED UPON A PROPER RECORD WHEN FINALLY PRESENTED TO THE COURT OF APPEAL

The second question presented in the petition is whether there is some constitutional inadequacy in the adjudicatory hearing process conducted by the Commission. The Court of Appeal did not decide this question because it concluded that the issue was never raised before the trial court, that it proceeds from an administrative hearing on an unrelated permit matter,

and that it is unsupported by any record demonstrating a constitutional inadequacy in proceedings conducted by the Commission on the Piuma development.[2/] Pet. at A-17-19.) These same inadequacies in the record foreclose any determination of that question by this Court.

On appeal from the judgment, Quaker sought for the first time to have the Court of Appeal take judicial notice of a hearing before the Commission on an application to develop another property owned by it unrelated to proceedings on the Piuma property. Specifically, Quaker sought to introduce evidence from that matter that land use proceedings before the Commission lack cross-examination, the ability to subpoena witnesses, testimony under oath, a judicial officer to make rulings on evidentiary questions, or reasonable limitations on hearing time. From this, it argued that the "limited" record a landowner is able to create in a Commission proceeding unfairly restricts the matters which can be argued in mandamus and prevents proof of a taking.

The Court of Appeal rejected Quaker's judicial notice request, stating:

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2. The Court did observe, however, that "as far as can be determined in the absence of a proper record, the rules of chapter 5 of title 14 of the California Administrative Code would have afforded Quaker a fair opportunity to be heard and to place sufficient written material in the administrative record to provide an adequate basis upon which thereafter to seek administrative mandate respecting any taking asserted to have resulted from the Commission's ruling." Pet. at A-17; footnote omitted.

"Based upon the present record, it can only be concluded that any asserted inability on the part of Quaker to present its constitutional claim adequately in the context of a CCP section 1094.5 is self-inflicted, and not properly before this court because Quaker never bothered to create the necessary record. We have no transcript of the hearing before the Commission and no trial court record from which we might have found Quaker's claims had merit." Pet. at A-19.

Just as the record did not permit the California court to address the question, it fails to provide any factual setting or procedural posture from which this Court can determine the constitutional adequacy of Commission's 1983 proceedings on the "Piuma" approval. A federal question must be raised, presented and pursued in a timely and proper manner at the appropriate point or points in the state court proceedings (Godchaux Co. v. Estopinal, 251 U.S. 179, 181 (1919); Beck v. Washington, 369 U.S. 541, 550-554 (1962)), and that includes raising the question before the trial court. Hulbert v. Chicago, 202 U.S. 275, 279-280 (1906). Since the issue was never timely or properly presented to the California courts, it falls well short of raising a properly reviewable federal question.

It bears emphasis, moreover, that the nature of the challenge placed here is much more focused than the very generalized argument offered by Quaker. It seeks to attack conditions imposed on a grant of permit. In determining whether a conditional dedication constitutes a "taking" under the Fifth Amendment, the question is whether the condition imposed "substantially advances a

legitimate state interest." Nollan v. California Coastal Comm'n, 483 U.S. 825, 834, 841 (1987). As the Court of Appeal observed: "[T]he present procedure for administrative mandate has not prevented landowners from proving conditions imposed by the Commission have been excessive or invalid." Pet. at A-18. For example, in Nollan the landowner protested before the Commission the imposition of a public access condition on approval of a beachfront residence, and ultimately successfully argued to this Court that the condition worked an unconstitutional taking. Id. at 837. Fundamental principles of judicial review require that any claim of constitutional infirmity in an agency's procedures proceed from a proper record. Here it does not, and thus the question does not qualify for review by this Court.

III.

REVIEW OF THE REMAINING FEDERAL QUESTIONS ASSERTED IS FORECLOSED BECAUSE THE DECISION OF THE COURT OF APPEAL THAT QUAKER WAIVED ITS RIGHT TO ATTACK ITS CONDITIONAL APPROVAL AND SUE FOR DAMAGES CONSTITUTES AN INDEPENDENT AND ADEQUATE STATE GROUND SUFFICIENT, BY ITSELF, TO MAINTAIN THE JUDGMENT BELOW

The primary issue addressed in the Court of Appeal decision concerned the propriety of Quaker's attempt to collaterally challenge the conditions placed on its 1983

"Piuma" permit approval by way of inverse condemnation. The Court held, applying settled state law, that Quaker waived its right to attack the conditions when it accepted the benefits of the permit and complied with the conditions. Pet. at A-13. That waiver constitutes an independent and adequate state ground supporting the judgment below. It precludes Quaker's belated attack on the permit conditions on any ground, including federal constitutional grounds. Black v. Cutter Laboratories, 351 U.S. 292, 297-298 (1956); Eustis v. Bolles, 150 U.S. 361, 364-370 (1893); Beaupre' v. Noyes, 138 U.S. 397, 401-402 (1891).

A. Under California Law, a Landowner Who Accepts a Permit and Complies with its Conditions Waives the Right to Assert the Invalidity of the Conditions and Sue the Issuing Public Entity for the Costs of Complying

Quaker below conceded that it has complied with the conditions imposed by the Commission upon development of its Piuma property. That it therefore waived its right to assert the invalidity of the conditions and sue for damages was compelled by well established state law and the facts presented on the face of the complaint.

Under California law, a landowner is barred from challenging a condition imposed upon the granting of a special permit if he has accepted the benefits afforded by the permit and has acquiesced in the condition by either specifically agreeing to the condition or failing to challenge its validity. County of Imperial v. McDougal, 19 Cal.3d 505, 510-511 (1977).

Pfeiffer v. City of La Mesa, 69 Cal.App.3d 74, 78 (1977) states the rule similarly:

> "It is fundamental that a landowner who accepts a building permit and complies with its conditions waives the right to assert the invalidity of the conditions and sue the issuing public entity for the costs of complying with them . . . If the conditions imposed by the city in their permit were invalid, Code of Civil Procedure section 1094.5 provided plaintiffs with the right and procedures to eliminate them. By declining to avail themselves of those procedures, plaintiffs cannot convert that right into a cause of action in inverse condemnation." (Emphasis added.)

Quaker argues a party may not be "required" to waive a constitutional challenge. Pet. at 13. That is not this case. Nothing in the record, pleaded or argued suggests Quaker was "required" in any manner to waive constitutional claims and accept the benefits of, and conditions placed upon, its subdivision approval. The waiver here was solely of its own making, as is clear from the allegations set forth in the complaint. The complaint concedes that Quaker was issued its coastal development permit for the Piuma development on July 23, 1985 and that it has since complied with the conditions imposed by the Commission. Jt. App. #6, Complaint ¶ 64. Specifically, it alleges that Quaker entered into a contract with the Mountains Restoration Trust, a quasi-public agency, to satisfy a requirement that it purchase 21 transferable development credits ("TDCs"), and that it made its last and final payment to comply with the Commission's conditional approval on or about August 1987, approximately a month before this suit was

filed. Id., ¶ 64A. Further, it alleges that it recorded the offer to dedicate an open space easement required as a condition of its permit approval. Id., ¶ 64B.

The State's Coastal Act contains a provision which specifically allows for judicial review of any final decision or action of the Commission in administrative mandamus.[3/] This procedure was well known to Quaker. As to the Commission's decision on Quaker's application to subdivide the Mulholland property, Quaker timely pursued administrative mandamus review to challenge the validity of that adjudicatory action. By contrast, as to its Piuma property, it simply elected not to pursue mandate review of the permit conditions imposed on its subdivision approval and accepted the benefits of the permit issued. Under the County of Imperial Pfeiffer rule, Quaker thus waived its right to later claim damages based on the alleged invalidity of those conditions.

The cases cited by Quaker neither support a contrary result nor elevate the issue to one of constitutional dimension. Nollan v. California Coastal Comm'n, supra, 483 U.S. 825, did not address or decide the waiver issue. Unlike Quaker in this case, the Nollans filed a timely suit in administrative mandamus challenging the access condition imposed on approval of their beachfront residence. No permit was issued to the Nollans, and

3. California Public Resources Code section 30801 provides in pertinent part: "Any aggrieved person shall have a right to judicial review of any decision or action of the commission or a regional commission by filing a petition for a writ of mandate in accordance with the provisions of Section 1094.5 of the Code of Civil Procedure, within 60 days after such decision or action has become final."

they did not comply with the condition. The Nollans therefore preserved their legal ability to challenge the permit condition imposed. It is true that "[w]hile the application was pending, the Nollans satisfied the condition on their option to purchase by tearing down the bungalow and building the new house and bought the property" (Id. at 829-830), but because the Nollans timely pursued their challenge to the Commission's access requirement, the Court nonetheless proceeded to address and invalidate it.

This case, McDougal, and Pfeiffer present a strikingly different situation from that in Nollan: in each the condition was accepted, the permit was issued, and no timely review in mandate, as required, was sought.

Neither is the narrow fact-based exception to waiver in Salton Bay Marina, Inc. v. Imperial Irr. Dist., 172 Cal.App.3d 914 (1985), applicable. There, as a condition of subdivision approval, plaintiffs entered into written agreements with the County not to sue the Irrigation District and to hold it harmless from any damages or injury caused by the rising of the Salton Sea. When plaintiffs' properties were thereafter flooded because of changes in the District's own management practices, they sued in inverse condemnation. On appeal, the court rejected application of the waiver rule for three reasons, none of which has any conceivable relevance here.

First, the court found the agreements void as against public policy because they exempted the District from liability without provision for recourse where the flooding was caused by the District's own negligence. Id. at 941. No factual parallel is provided here.

Second, the court concluded that the rule should not apply when the intent of the land use approval is not merely to regulate the development of land or to require a reasonable dedication, but to effectuate a taking without payment of compensation, as would have been the direct effect of the District's independent action there in causing arise in the level of the Salton Sea. Id. The conditions here were directed solely to the impacts of the subdivision approval applied for, and did not seek to immunize the Commission from liability from any actions that it might take independent of the permit proceeding.

Third, the court stated that before the estoppel doctrine may be applied, it is necessary that the condition's effects be readily apparent to the party to be estopped. Id. at 942. In Salton Bay Marina it was not. In the instant matter it obviously was, and Quaker has never argued it did not comprehend the effect of the conditions placed on approval of its request for a 22-lot subdivision.

Finally, Dept. of Trans. ex rel. People v. Amoco Oil Co., 528 N.E.2d 1018 (Ill. App. 2 Dist. 1988), is of no assistance. It involves a collateral attack upon a void condition. In Amoco, the state Department of Transportation granted a permit allowing Amoco access to a state highway, but conditioned on the understanding that any improvement placed on the property could not serve to increase the value of the right of access when it was eventually terminated. The Illinois appellate court found the condition void because its purpose was solely to depress the property value in anticipation of future acquisition. 528 N.E.2d at 1024-1025. Amoco was therefore permitted to collaterally challenge its validity in

an eminent domain action later brought against it by the Department.

In this case, the power to impose both an open space requirement (Cal. Pub. Resources Code, §§ 30240, 30251; Paoli v. California Coastal Comm'n, 178 Cal.App.3d 544, 551-552 (1986)) and a transferable development credit condition to offset the cumulative effects associated with the grant of a subdivision permit authorizing new lots (Cal. Pub. Resources Code, §§ 30250, 30251) was well within the Commission's jurisdiction. Again, as conceded on the face of the complaint, Quaker fully complied with those conditions and accepted the permit issued. The Court of Appeal correctly decided, applying state law, that it unquestionably waived any right to collaterally attack the allegedly erroneous imposition of those conditions in inverse condemnation.

B. Apart from Waiver, the Court of Appeals Correctly Concluded that, Under Applicable State Court Procedure and Principles of Res Judicata, Quaker's Failure to Timely Challenge the Validity of the Conditions of its 1983 Permit Approval in Administrative Mandamus Foreclosed Any Later Suit for Damages.

While not necessary to affirmance of the judgment below, the Court additionally concluded that Quaker's failure to timely petition for administrative mandamus to invalidate the conditions, under applicable state court procedure and principles of res judicata, precluded suit in inverse condemnation. Pet. at A-15-16. The petition

contends this conflicts with the decision of this Court in First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987). However, Quaker gives First English a reading far beyond anything considered or decided by this Court. The Court of Appeal decision on this issue was correctly decided and is entirely consistent with both First English and well settled California law.

First English overruled the California Supreme Court's decision in Agins v. City of Tiburon, 24 Cal.3d 266 (1979), aff'd on other grounds, 447 U.S. 255 (1980), that a landowner may not maintain an inverse condemnation suit based on a "regulatory" taking and that his sole remedy in such an instance is to invalidate the regulatory action. The issue in First English concerned whether "the Fifth Amendment, as made applicable to the states through the Fourteenth Amendment, . . . require[s] compensation as a remedy for 'temporary' regulatory takings -- those regulatory takings which are ultimately invalidated by the courts." (482 U.S. at 310; emphasis added.) The Court held (at 321-322):

> " . . . that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective . . .
>
> " . . . [W]e hold that invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy." (Emphasis added.)

First English establishes that a landowner indeed has a remedy in damages for a "temporary" taking -- by definition, a taking for a distinct period which terminates with a determination of invalidity. However, in so deciding, the Court neither addressed nor limited state court procedures for testing the validity of an adjudicatory land use decision in the first instance. Neither did it address the res judicata effect of a final adjudicatory administrative decision as to which an aggrieved party has elected not to seek judicial review. The latter, in particular, controlled the decision of the Court of Appeal in this case.

Quite clearly, an essential predicate to the interim damage remedy is a determination that the agency's decision is invalid such that the presumption of validity which ordinarily attaches to it is overcome and the "period" of the taking is determined. In California, administrative mandamus provides the vehicle for that determination in the case of adjudicatory decisions of administration agencies.[4/] Moreover, it fosters the early

4. California Code of Civil Procedure section 1094.5 provides for judicial review of the validity of a final administrative order by petition for writ of mandate to the superior court. Subdivision (b) of that provision states: "The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."

disposition of interim damage claims.[5/] Indeed, the expeditious mandamus procedure benefits both the landowner and government by ensuring that the validity of its adjudicatory land use decisions does not remain in limbo for years. Further, government is not forced to set aside substantial contingency reserves to cover the extended periods of time that might be associated with a potential "temporary" taking, absent such a reasonably short statute of limitations.[6/]

Quaker confuses the notion of an "interim" regulatory taking with a permanent taking, where, as Quaker puts it, a government act may be valid and yet still require an award of just compensation. See, eg., Hurley v. Kincaid, 285 U.S. 95 (1931). In First English, however, this Court drew a clear distinction between the two remedies and stated that a "landowner has no right under the Just Compensation clause to insist that a 'temporary' taking

5. Statutes of limitation governing administrative mandamus matters are ordinarily quite brief (See, eg., Cal. Code Civ. Proc., § 1094.6(b) (90 days as to local government decisions); Cal. Pub. Resources Code, § 30801 (60 days as to Coastal Commission decisions)), and are usually treated as law and motion type matters providing for their prompt resolution. (Eg., Law Departments Policy Manual, Los Angeles Sup. Ct., Rules 421-436.)

6. On this issue, the California Court of Appeal in California Coastal Comm'n v. Superior Court (Ham), 210 Cal.App.3d 1488, 1496 (1989), aptly pointed out that "a property owner could delay nearly five years until the statute of limitations for an inverse condemnation action had almost expired, simply allowing his damages to accrue in the interim. In given cases and certainly in the aggregate, the financial burden on the state could be overwhelming."

be deemed a permanent taking." First English, 482 U.S. at 317. That is the prerogative of government once a court has determined the subject regulation is "invalid." Id. at 321.

First English involved an ordinance, the facial constitutionality of which was challenged on Fifth Amendment taking grounds. The Court did not consider the res judicata effect of a failure to challenge the validity of an adjudicatory action. This is equally true of the state court cases cited by Quaker; none involved adjudicatory action. In this case, the challenge placed is to the proceedings of an administrative agency which are distinctly adjudicatory, or "quasi-judicial," in nature. Patterson v. Central Coast Etc. Conservation Comm'n, 58 Cal.App.3d 833, 841 (1976); Natural Resources Defense Council, Inc. v. California Coastal Zone Conservation Comm'n, 57 Cal.App.3d 76, 83 (1976). Adjudicatory decisions made in this setting are entitled to a settled "presumption of regularity and legality of official action" (Cal. Evid. Code, § 664; DeLuca v. Board of Supervisors, 134 Cal.App.2d 606, 610 (1955)), and that presumption "is conclusive in the absence of contrary proof." Romero v. County of Santa Clara, 3 Cal.App.3d 700, 705 (1970). Indeed, under California law, a failure to seek judicial review of an adjudicatory administrative decision, including those made by the Commission, forecloses, on principles of res judicata, a party from later challenging the merits of that determination in a collateral proceeding. Monroe v. Trustees of the California State Colleges, 6 Cal.3d 399, 405-406 (1971); Stockton v. Dept. of Employment, 25 Cal.2d 264, 267-268 (1944); California Coastal Comm'n v. Superior Court (Ham), 210 Cal.App.3d 1488, 1496-1500 (1989); Knickerbocker v.

City of Stockton, 199 Cal.App.3d 235, 243-244 (1988). There is nothing novel in that rule. It is well recognized in the decisions of this Court. University of Tennessee v. Elliott, 478 U.S. 788, 796-799 (1986); United States v. Utah Construction & Mining Co., 384 U.S. 394, 422 (1966).

The landowner who follows the statutory mandate procedure and timely challenges an adjudicatory land use decision preserves his right under the Fifth Amendment to the just compensation remedy if the court invalidates that decision and concludes it has worked an "interim" taking of property. His remedy, as indicated by the Court of Appeal, is to file "an action for administrative mandamus before, or in conjunction with, its claim for inverse condemnation."[7] Pet. at A-22. If, however, he fails or elects not to pursue such a challenge, then the agency's land use decision is res judicata on any later collateral claim, including one for inverse condemnation.[8]

7. For example, in this case the trial court sustained respondents' demurrers to several causes of action in the complaint seeking interim damages arising from the Commission's decision conditionally approving Quaker's Mulholland property. Since Quaker had timely challenged that adjudicatory decision in a separately filed suit in administrative mandamus, the court permitted Quaker to simply add its damage causes of action by way of amendment to that suit. Jt. App. #5.

8. The citation by amicus Griffin Homes, Inc., to this Court's recent decision in Presault v. I.C.C., __U.S.__, 58 U.S.L.W. 4193 (1990), is well off the mark. Presault did not involve an attack on adjudicatory action, a claim for interim damages based on an asserted "temporary taking," or application of well-established principles of res judicata. It concerned a

In this case, the best that can be said about Quaker is that it simply sat on its rights. Nothing prevented Quaker from timely challenging the conditions placed on its coastal permit approval, and thus preserving its ability to secure interim damages in the event that decision was invalidated on taking grounds. Instead, as to its "Piuma" permit, Quaker accepted its permit and the benefits afforded thereby and complied with the conditions of approval, and gave absolutely no indication to government until over four years after the Commission's decision that it was dissatisfied with the decision or the conditions imposed. Since Quaker simply bypassed the

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challenge to the facial constitutionality of a provision of the so-called "rails-to-trails" statute. The Court reaffirmed the long-standing rule that "taking claims against the Federal Government are premature until the property owner has availed itself of the process provided in the Tucker Act." Id. at 4196. Under the Tucker Act, the Court pointed out that "[i]f there is a taking," it is "within the jurisdiction of the [Claims Court] to hear and determine." Id. Since the petitioners in Presault failed to make use of the available Tucker Act remedy, the Court found their taking claim to be premature. Id. at 4197. It would require a remarkable extension to read the case, as Griffin Homes does, to state that, as to federal liability, one must seek just compensation first in the Court of Claims, and then later a determination of invalidity. The case merely holds that as a matter of federal procedure, a compensable taking claim must be pursued in the Claims Court, and not, as there, in the Court of Appeal on appeal from a decision of the ICC.

California has no counterpart to the Tucker Act. "Temporary taking" claims are heard and determined in the superior court. In the case of adjudicatory administrative action, interim damages are properly pursued by filing a claim for inverse condemnation in conjunction with, or after, an action for administrative mandamus.

mandate remedy, the Court of Appeal correctly concluded that, apart from waiver, Quaker is foreclosed, under well established state court procedures and principles of res judicata, from belatedly attempting to collaterally attack the Commission's decision through damage causes of action.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

DATED: March 16, 1990.

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General
of the State of California
N. GREGORY TAYLOR
Assistant Attorney General
ANTHONY M. SUMMERS
DENNIS M. EAGAN
Supervising Deputy Attorneys General
*STEVEN H. KAUFMANN
Deputy Attorney General

Attorneys for Respondents
State of California and
California Coastal Commission

Counsel of Record

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On March 19, 1990, I served the within Respondents' Brief in Opposition in re: "Rossco Holdings Inc. vs. State of California, California Coastal Commission" in the United States Supreme Court, October Term, 1989, No. 89-1314, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Joseph M. Gughemetti
Gughemetti & Spangenberg
Attorneys at Law
800 Airport Boulevard,
Suite 410
Burlingame, California 94010

Charles Moore
Deputy County Counsel
County of Los Angeles
648 Hall of Administration
Los Angeles, California 90012

G. Greg Aftergood, Esq.
15915 Ventura Boulevard
Penthouse 1
Encino, California 91436

Ronald A. Zumbrun
Edward J. Connor, Jr.
John M. Groen
Pacific Legal Foundation
2700 Gateway Oaks Drive,
Suite 200
Sacramento, California 95833

Michael M. Berger
Fadem, Berger & Norton
A Professional Corporation
P.O. Box 250050
Los Angeles, California 90025

All Parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 19, 1990, at Los Angeles, California.

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CE CE MEDINA